الجمعية المصرية للقانون الدولى

١٦ شارع رمسيس — تليفون ٤٨١٦٢ — القاهرة

مجموعـــة

محاضرات الحلقة الدراسية للموسم الثقافى التى ألقيت بدار الجمعيـــة عام ١٩٦٤

ملحق للمجلد رقم ١٩/١٩٦٣ من
المجـلة المصرية للقـانون الدولى

مطابع كوستاتسوماس وشركاه
٥ شارع وقف الخربوطلى بالظاهر ج. ع. م
تليفون ٩٠٠١١٨ ص. ب ١٣٤١١

تصـــدير

تفضلت الجمعية المصرية للقانون الدولى فشرفتنى إذ كلفتنى بالإشراف على نشاطها العلمى ، وباعداد حلقة دراسية للموسم الثقافى للجمعية .

وقد تفضل زملائى الأفاضل بالمعاونة المثمرة القيمة ، فاعدوا محاضرات لإلقائها بدار الجمعية فى موضوعات هامة ومختلفة ، مستهدفين نشر العلم بالقانون الدولى ، والتعرف على أصوله وقواعده وأحكامه النامية المتطورة .

وقد رأت الجمعية المصرية للقانون الدولى — تعميماً للفائدة — أن تنشر هذه المحاضرات فى عدد خاص ، لتبقى زاداً لطلاب القانون يسترشدون بها ويأنسون إليها فى مراحل دراساتهم .

ويسرنى كل السرور أن أسجل لهم جميعاً شكرى وشكر الجمعية على ما أضافوا للعلم من انتاجهم القيم .

حامد سلطان

سنة ١٩٦٤

المحتويات

المركز الدولى

لعدن ومحمياتها ولاتحاد الجنوب العربى

بقلم دكتور محمد حافظ غانم
أستاذ القانون الدولى العام – بكلية الحقوق جامعة عين شمس

سنتناول فى هذه المحاضرة موضوعين :

أولهما يتناول تطور قواعد القانون الدولى المتعلقة بالاستعمار والثانى يتعلق بالمركز الدولى لعدن ومحمياتها واتحاد الجنوب العربى .

المبحث الأول

تطور قواعد القانون الدولى المتعلقة باستعمار

أولا : الاستعمار فى القانون الدولى التقليدى :

كان القانون الدولى التقليدى يعترف بالاستعمار ولا يؤكد حق الشعوب فى تقرير مصيرها . ولم يكن هذا الأمر يثير الدهشة أو التعجب لأنه من المعلوم أن قواعد ذلك القانون وضعتها الدول الأوربية منذ القرن السادس عشر لكى تحكم علاقاتها فيما بينها ولكى تنظم تنافسها فى مجال السيطرة على الشعوب غير الأوربية . ولم تكن الدول الأوروبية التى وضعت القانون الدولى تعترف بحق شعوب القارات الأخرى فى أن تكون دولا مستقلة ذات سيادة كما أنها لم تعترف بالمساواة فى الحقوق والواجبات بين كافة شعوب العالم .

وعلى ذلك كانت الدول الأوروبية تستبعد شعوب القارات الأخرى من نطاق المجتمع الدولى وتنظر إليها باعتبارها شعوباً غير متمدنة لا تتمتع بالحقوق المقررة للدول فى القانون الدولى ومن ثم يجوز استعمارها والسيطرة عليها واخضاعها لحكم الشعوب الأوروبية .

---

* محاضرة ألقيت بدار الجمعية المصرية للقانون الدولى فى ٢٠ فبراير ١٩٦٤ .

ومن ثم احتوى القانون الدولى التقليدى على تنظيم لوسائل اكتساب السيادة على المستعمرات . ومن أهم هذه الوسائل اكتشاف الأقاليم والاستيلاء عليها ، والفتح ، والتنازل ، وفرض الحماية الاستعمارية أو توزيع مناطق النفوذ[1] وزيادة على ذلك كان القانون الدولى يعترف بشرعية المعاهدات غير المتكافئة التى تفرض على الشعوب بغير رضاها ولا يضمن كفالة حقوق الإنسان، ولا يحرم التميز العنصرى ،ولا يكفل حمايةسيادة كل دولة على مواردها الطبيعية والاقتصادية .

وفى ظل القانون الدولى التقليدى يمكن التميز بين ثلاثة أنواع من الدول والأقاليم .

١ – الدول كاملة السيادة[2] :

وهى الدول المعترف بوجودها كدول مستقلة تستطيع ممارسة كافة الاختصاصات التى يعترف بها القانون الدولى للدولة مثل التصرف فى كل شئونها الداخلية والخارجية والتعامل مع الدول الأخرى دون أن تخضع فى مباشرتها لتلك الاختصاصات لرقابة أو سيطرة دولة أخرى أو جهة أجنبية ، وبعبارة أخرى هى الدول المستقلة استقلالا كاملا لا تشوبه شائبة فى الداخل أو الخارج .

٢ – الدول ناقصة السيادة :

وهى الدول المعترف بوجودها كدول ذات سيادة ، ولكن هذه السيادة منتقصة نتيجة لتدخل دولة أجنبية أو هيئة أجنبية فى مباشرة هذه الدول لبعض اختصاصاتها فتكون الدول ناقصة السيادة فى حالة تبعية وخضوع لتلك الدولة أو الهيئة[3]. ومن أمثلة هذا النوع من الدول الموضوعة تحت الحماية ، والدول الموضوعة تحت الوصاية والدول المرتبطة بمعاهدات غير متكافئة .

---

(١) راجع فى شرح قواعد القانون الدولى المتصلة بهذه الوسائل المختلفة مؤلفنا (مبادئ القانون الدولى العام (سنة ١٩٦٤ ص ٢٤٣ وما بعدها .

(٢) انظر Delbez « موجز القانون الدولى » ص ٩٢ وما بعدها .

(٣) انظر Cavaré (القانون الدولى العام) ص ٤٧٢ وما بعدها .

ومن الواضح أن نقص سيادة بعض الدول على النحو السابق بيانه ظاهرة استعمارية تدخل فى نطاق الاستعمار بالمعنى الواسع الذى يشمل كل الأحوال التى يخضع فيها شعب لرابطة تبعية تخضعه لسيطرة شعب آخر غريب عنه بجنسه وثقافته .

٣ – المستعمرات :

وهى تشمل الأقاليم التى تحكم حكماً مباشراً بواسطة دول أجنبية عنها ، والتى حرم سكانها من حقهم فى تقرير مصيرهم . ووفقاً لقواعد القانون الدولى التقليدى تعتبر المستعمرة جزءاً من إقليم الدولة صاحبة السيادة عليها ، ولا تتمتع بالشخصية الدولية وتعد العلاقة بينها وبين الدول الاستعمارية من علاقات القانون الداخلى التى كان القانون الدولى لا يتدخل فيها[1] .

ثانياً – عوامل تطور قواعد القانون الدولى المتعلقة بالاستعمار :

استطاع النظام الاستعمارى بفضل الرعاية التى أحاطه بها القانون الدولى التقليدى أن يبلغ مداه من القوة ومن الاتساع فى القرن التاسع عشر وفى أول القرن العشرين . وكانت دول أوروبا الصناعية تتنافس على اكتساب السيادة على المستعمرات للحصول على المواد الخام وعلى أسواق لتصريف المنتجات الصناعية وبصفة خاصة بعد أن تكتلت داخل هذه الدول رؤوس أموال عديدة تسعى إلى الاستعمار ، وبعد أن تطورت وسائل الإنتاج ، وحلت الآلات الضخمة محل الإنتاج اليدوى ، وتحسنت وسائل المواصلات وقلت نفقات النقل ، واستخدم البخار والكهرباء كمصادر للقوة على نطاق واسع . وكانت إنجلترا وفرنسا وألمانيا وهولنده وأسبانيا والبرتغال وإيطاليا أهم الدول الاستعمارية فى هذه المرحلة .

وعلى أن ذلك الوضع بدأ فى الانهيار وبصفة خاصة بعد الحرب العالمية الأولى التى ترتب عليها تصفية الإمبراطورية العثمانية وحرمان ألمانيا من

(١) سنبين فيما بعد أن هذا الوضع تغير فى ظل ميثاق الأمم المتحدة .

مستعمراتها . كما نتج عن الحرب العالمية الثانية تصفية الإمبراطورية الإيطالية والإمبراطورية اليابانية وبدء تفكك الإمبراطوريات الفرنسية والإنجليزية والهولندية[1] .

وسندرس فيما يلي الأسباب التي أدت إلى انهزام الاستعمار وإلى تغير موقف القانون الدولي منه .

١ – ثورة شعوب المستعمرات :

قاومت شعوب المستعمرات الحكم الاستعماري بكل ما لديها من امكانيات مما جعل هذا الحكم مزعزعاً يستند إلى البطش والقوة ، ويوجه عمليات قمع وإبادة وضد الوطنيين . كما قاومت شعوب المستعمرات محاولات بعض الدول الاستعمارية إدماج المستعمرات في الدول الاستعمارية واعتبار المستعمرات أقاليم ما وراء البحار وقاومت كذلك محاولات توطين أشخاص من الأجانب بقصد تغيير الطبيعة الإنسانية للمستعمرة . ووقف سكان المستعمرات بالمرصاد لمحاولات الدول الاستعمارية لكي تربط بين مصالحها وبين مصالح فئة قليلة من العملاء والاقطاعيين والرأسماليين التابعين لمصالح الاستعمار والانتهازيين والمقامرين .

وكان اندلاع الثورات في المستعمرات وقيام الكفاح المنظم ضد السيطرة الأجنبية إيذاناً بأفول نجم الاستعمار بعد أن هددت هذه الثورات حياة المستعمرين ومصالحهم المالية والاقتصادية وجعلت استمرار نظام الاستعمار التقليدي أمراً محالا[2] .

---

(١) حينما نشبت الحرب العالمية الثانية كان ثلث سكان العالم يعيشون في مستعمرات تخضع للإدارة الأجنبية ، وكان عدداً آخر من الدول التي اعترف باستقلالها ترتبط بمعاهدات غير متكافئة أو تقع في منطقة نفوذ لدولة أجنبية .

(٢) راجع الفصل العاشر من ميثاق العمل الوطني للجمهورية العربية المتحدة سنة ٦٢ الذي يبين كيف أن شعب الجمهورية العربية المتحدة في حر به ضد الاستعمار ضرب مثلا حياً ما زال أسطورة في تاريخ الشعوب .

٢ — استنكار الرأى العام العالمى للآثار السيئة التى يلحقها الاستعمار بالمجتمع الدولى :

ولقد صاحب كفاح شعوب المستعمرات والدول التابعة يقظة جانب هام من الرأى العام وإحساسه بما يلحقه من الاستعمار بؤس بشعوب المستعمرات بدون مراعاة لأية ضوابط قانونية سليمة ، وبدون احترام لحقوق الإنسان وكرامته ولمبادئ الأخلاق .

كما أن الرأي العام العالمى أحس تحت تأثير الكثير من النظريات السياسية والاقتصادية الحديثة بما يحدثه الاستعمار من اضطراب فى ميدان العلاقات الدولية ومن حروب لا نهاية لها تتحمل أعباءها الشعوب دون أن تفيد منها حيث أنه من الممكن تحقيق التعاون والتبادل بين شعوب العالم للفائدة المشتركة إذا ما قضى على النظام الاستعمارى القديم . وزيادة على ذلك فقد أصبح من الواضح أن استمرار الاستعمار رغم معارضة شعوب المستعمرات والدول التابعة من شأنه إثارة الكراهية والحقد بين شعوب العالم وتحطيم ما بينها من تضامن اجتماعى تفرضه وحدة الطبيعة الإنسانية وضرورة التعامل بين الشعوب

وأخيراً فان الحاق اقتصاد المستعمرات والدول التابعة باقتصاد الدول الاستعمارية من شأنه إعاقة التجارة الدولية ووضع العقبات فى سبيل تنظيم العلاقات الاقتصادية الدولية بطريقة سليمة من شأنها تحقيق الرخاء العالمى ومنع الاختلالات الاقتصادية .

٣ — الحروب الاستعمارية تضعف الدول الاستعمارية التقليدية وتهدد العالم بالخراب :

كان التنافس الاستعمارى بين الدول على الاستيلاء على المستعمرات ومناطق النفوذ خطر يهدد السلام والأمن الدولى ومن الثابت أن تسابق الدول الاستعمارية على اقتسام أفريقيا كان من أسباب قيام الحرب العالمية الأولى ، كما كان التنافس على الأسواق الخارجية ومناطق النفوذ سبباً لقيام الحرب

العالمية الثانية . ولقد كان اتساع نطاق الحروب الاستعمارية لكى تصبح حروباً عالمية شاملة تستخدم فيها أسلحة التدمير الجماعى على أوسع نطاق مما يؤدى إلى فناء الملايين من بنى الإنسان وإلى خراب شامل يعم كافة أرجاء العالم أمراً لا يمكن السكوت عليه .

وزيادة على ذلك فلقد أدت هذه الحروب المتواصلة إلى انهاك الدول الاستعمارية فلقد ترتب على الحرب العالمية الأولى تحطيم الإمبراطورية العثمانية وإمبراطورية النمسا والمجر وحرمان ألمانيا من مستعمراتها . وترتب على الحرب العالمية الثانية اندحار ألمانيا وتقسيمها ، وحرمان إيطاليا واليابان من مستعمراتها ، وتفكك الإمبراطوريات الفرنسية والهولندية والإنجليزية . كما أن مساهمة شعوب المستعمرات فى هذه الحروب تحت علم المستعمرين أعطاها الخبرة الكافية بوسائل القتال والمقاومة وألهب حماسها فى تحقيق الوعود التى قطعتها على نفسها الدول الاستعمارية تحت تأثير ظروف الحرب بمنح تلك الشعوب الحرية والمســاواه .

٤ ــ تأييد الكتلة الشيوعية وظروف الحرب البــاردة :

يعتبر وصول الحزب الشيوعى إلى الحكم فى الاتحاد السوفيتى فى أعقاب الحرب العالمية الأولى بداية مرحلة جديدة فى ميدان العلاقات الدولية . ومن الثابت أن كل محاولات الدول الرأسمالية لعدم الاعتراف بحكومة الاتحاد السوفيتى أو لمقاطعتها أو حصرها ذهبت أدراج الرياح . بل على العكس من ذلك امتدت الشيوعية بعد الحرب العالمية الثانية لكى تشمل أوروبا الشرقية والصين ومناطق أخرى من آسيا ، مما أدى إلى تكوين كتلة قوية من الدول الشيوعية . ولقد وقفت هذه الكتلة موقفاً معادياً للاستعمار على اعتبار أنه مرحلة من مراحل تطور الرأسمالية كما أدت ظروف الحرب الباردة بين الكتلة الشيوعية والكتلة الرأسمالية إلى قيام الكتلة الشيوعية بمد يد المعونة

للثورات التحريرية والعمل على دعم تلك الحركات معنوياً وسياسياً[1] . كما أدت هذه الظروف إلى تحرج موقف الولايات المتحدة باعتبارها زعيمة الكتلة الرأسمالية ، فقد كان على هذه الدولة أن توائم بين ارتباطاتها مع الدول الاستعمارية القديمة ومصالحها الاقتصادية والاستراتيجية فى آسيا وأفريقيا وبين وخوفها من ارتماء شعوب المستعمرات فى أحضان الكتلة الشيوعية .

ثالثاً – القانون الدولى يتدخل لمحاولة حل المشكلة الاستعمارية

١ – المحاولات المبدئية :

بينما أن القانون الدولى التقليدى كان لا يهتم بشئون المستعمرات إلا من حيث تنظيم الحركة الاستعمارية كتحديد قواعد الاستيلاء والفتح والضم وأجازة فرض المعاهدات على الشعوب عن طريق الاكراه . أما علاقة المستعمرة نفسها بالدولة صاحبة السيادة عليها فقد كانت من المسائل الداخلية فلم تتقيد الدول الاستعمارية فى إدارتها للمستعمرات بأية التزامات دولية .

ومن الملاحظ أن الدول الاستعمارية بدأت منذ أواخر القرن التاسع عشر بعض الجهود المشتركة ذات الطابع الدولى لمعاجلة بعض المشكلات المتعلقة بالتوسع الاستعمارى وبتوزيع المستعمرات والأقاليم الصالحة للاستعمار فيما بينها .

وكان من نتيجة ذلك عقد مؤتمرين دوليين وهما مؤتمر برلين سنة ١٨٨٥ ومؤتمر بروكسل سنة ١٨٩٠ . ولقد انتهى المؤتمر الأول إلى ابرام اتفاقية برلين سنة ١٨٨٥ التى نظمت القواعد الخاصة بوضع اليد على الأقاليم الأفريقية بقصد منع قيام المنازعات بين الدول الاستعمارية حول توافر شروط وضع اليد . كما انتهى المؤتمر الثانى إلى ابرام اتفاقية بروكسل سنة ١٨٩٠ المتعلقة بمكافحة الاتجار بالرقيق فى المستعمرات[2] .

---

(١) أعلنت الحكومة الروسية المؤقته منذ ١٩ أبريل سنة ١٩١٧ تأييدها لحق الشعوب فى تقرير مصيرها ، ثم توالت بعد ذلك تأكيدات الاتحاد السوفيتى لمعارضته للاستعمار ولقد تقدم الرئيس خروشوف فى سنة ١٩٦٠ باقتراح للجمعية العامة للأمم المتحدة بتصفية الاستعمار .

(٢) راجع رسالة الدكتور أحمد عثمان (التنظيم الدولى لإدارة المستعمرات) سنة ١٩٦٣ ص ٣٣ وما بعدها .

على أن هذه المحاولات المبدئية كانت تتصل بتنظيم تعاون الدول الأوربية فى المجال الاستعمارى ولم يقصد منها تقرير عدم مشروعية الاستعمار ، أو وضع نظام عام لحماية سكان المستعمرات أو للاعتراف بحقوقهم أو للسماح لهم بتقرير مصيرهم .

٢ ـ ظهور مبدأ حق الشعوب فى تقرير مصـــيرها :

يقصد بحق تقرير المصير حق كل أمة[١] فى أن تقرر بحرية وبدون تدخل أجنبى مستقبلها السياسى والاقتصادى .

ويرتبط ظهور حق تقرير المصير كاتجاه سياسى بالثورة الفرنسية التى نادت بحق الشعوب فى تقرير مصيرها . ولقد أصدرت الجمعية الوطنية الفرنسية مرسومين بتاريخ ١٩ نوفمبر سنة ١٧٩٢ وبتاريخ ١٥ ديسمبر سنة ١٧٩٢ أعلنتا فيهما تقديم المساعدة للشعوب الراغبة فى ممارسة حقها فى تقرير مصيرها وفى استعادة حريتها . على أن هذه الحركة التحريرية لم يكتب لها النجاح نتيجة لتألب الدول الأوروبية على الثورة الفرنسية ووصل نابوليون للحكم ثم هزيمته وقيام تحالف مقدس رجعى بين الملكيات الأوروبية وحينما أعلن الرئيس الأمريكى جيمس مونرو فى سنة ١٨٢٣ مذهبه فى عدم تدخل الدول الأوروبية فى شئون القارة الأمريكية اعترف بحق الأمم الأمريكية فى الاستقلال وفى التخلص من الاستبداد ومن الرقابة الأجنبية .

وقد لاقى مذهب حق تقرير المصير تأييداً من علماء السياسة وفقهاء القانون[٢] ، ومن ذلك أن العالم الإيطالى مانشينى طالب فى سنة ١٨٥١ بوجوب إعطاء كل جماعة قومية الحق فى تكوين دولة وبأن تقسيم العالم إلى دول يجب أن يستند إلى القوميات وكان هدفه من ذلك تحقيق الوحدة الإيطالية . كما كان

---

(١) لن نتعرض فى هذا البحث لتعريف الأمة .
(٢) راجع مؤلفنا (مبادئ القانون الدولى العام) سنة ١٩٦٤ ص ١٤٢ وما بعدها ومؤلف الأستاذ شارل روسو (القانون الدولى العام) سنة ٥٣ ص ٨١ وما بعدها .

من مظاهر تطبيق هذا المبدأ تحرير بعض الأمم الأوروبية التى كانت تخضع لحكم دول أجنبية فأعلن استقلال بلجيكا سنة ١٨٣١ واليونان سنة ١٨٣٢ واعترف باستقلال رومانيا والصرب وبلغاريا سنة ١٨٧٨ .

ولما قامت الحرب العالمية الأولى أكد الرئيس الأمريكى ويلسن[1] فى بيانات وتصريحات متعددة تأييده لحق الشعوب فى تقرير مصيرها ، كما أعلنت حكومات الحلفاء إيمانها بهذا المبدأ على أنه لم يمكن فى العمل احترام الحلفاء لمبدأ حق الشعوب فى تقرير مصيرها نتيجة لتمسك الدول الكبرى بمطامعها وسياستها الاستعمارية .

ونخلص مما تقدم أن حق تقرير المصير ظل مجرد مبدأ فلسفى وسياسى دون أن يصبح من القواعد الوضعية للقانون الدولى .

ولقد بدأ حق تقرير المصير يدخل فى نطاق القانون الدولى بالنص عليه فى أكثر من نص من نصوص ميثاق الأمم المتحدة وبصفة خاصة فى المادة الأولى فقرة ٢ من الميثاق التى نصت على الآتى :

انماء العلاقات الودية بين الدول على أساس احترام المبدأ الذى يقضى بأن للشعوب حقوقاً متساوية ، ويجعل لها تقرير مصيرها . . .[2].

على أن الفقرة الثانية من المادة الأولى من ميثاق الأمم المتحدة لم تعرف حق تقرير المصير ولم تبين طريقة استعماله مما جعل النص على هذا الحق محدود الأهمية . ولقد أوصت الجمعية العامة للأمم المتحدة فى ٢١ أبريل سنة ١٩٥٢ لجنة حقوق الإنسان المدنية والسياسية وفى مشروع الحقوق الاقتصادية والاجتماعية . ويحتوى هذين المشروعين على تعهد الدول بما فيها تلك التى تدير أقاليم غير متمتعة بالحكم الذاتى أو أقاليم خاضعة للوصاية بضمان حق تقرير المصير فى هذه الأقاليم . ويشمل حق تقرير المصير علاوة على ما تقدم حق كل شعب فى السيادة على ثرواته وموارده الطبيعية .

---

(١) راجع مؤلفنا (مبادئ القانون الدولى العام) سنة ١٩٦٤ ص ١٤٢ وما بعدها ومؤلف الأستاذ شارل روسو (القانون الدولى العام) سنة ١٩٥٣ ص ٨١ وما بعدها .

(٢) نصت المادة ٥٥ من ميثاق الأمم المتحدة كذلك على حق الشعوب فى تقرير مصيرها .

السير علاوة على ما تقدم حق كل شعب فى السيادة على ثرواته وموارده الطبيعيـــة .

ولقد أكدت الجمعية العامة للأمم المتحدة فى أكثر من مناسبة حق الشعوب فى تقرير مصيرها وبصفة خاصة حينما أصدرت قرار تصفية الاستعمار فى سنة ١٩٦٠ وسنتعرض لهذا القرار فيما بعد(١).

ومن المهم أخيراً الإشارة إلى أن قرارات مؤتمر باندونج الذى اجتمع فى سنة ١٩٥٥ والذى ضم ممثلين لتسع وعشرين دولة أسيوية وأفريقية نص على ضرورة احترام حق تقرير المصير ، كما تأكد هذا المبدأ فى مؤتمر أديس أبابا سنة ١٩٦٠ والدار البيضاء سنة ١٩٦١ وفى مؤتمر القمة الأفريقى سنة ١٩٦٣ .

٣ – إنشاء نظام الانتداب :

بحث الحلفاء المنتصرون فى الحرب العالمية الأولى مصير المستعمرات الألمانية والتركية واتفقوا على وضع هذه الأقاليم تحت الرعاية الدولية لعصبة الأمم التى تقوم بانتداب دولة من الدول لإدارة تلك الأقاليم تحت إشرافها .

واحتوت المادة ٢٢ من ميثاق عصبة الأمم على تحديد لنظام الانتداب ، فنصت على أنه يطبق على المستعمرات والأقاليم التى خرجت بعد انتهاء الحرب من سيادة الدول التى كانت تسكنها قبلا والمسكونة بشعوب لا تزال قادرة على أن تدير شئونها .

وقرر الميثاق أن سعادة هذه الشعوب وتقدمها أمانة مقدسة فى عنق الإنسانية كما قرر فرض رقابة على تنفيذ الانتداب ، فقرر أن تقوم الدول التى تمارس الانتداب بتقديم تقرير سنوى عن الأحوال فى الإقليم لمجلس عصبة الأمم . ويحيل المجلس هذا التقرير على لجنة خاصة هى لجنة الانتداب التى تقوم

---

(١) راجع مقال الأستاذ حسن كامل حق تقرير المصير القومى – المجلة المصرية للقانون الدولى المجلد الثانى عشر – الجزء الأول سنة ١٩٥٦ ص ١ وما بعدها .

بفحصه وتبين المخالفات التى تكون قد أتتها الدولة صاحبة الانتداب ، وتشير بما تراه فى هذا الشأن .

ومع أن نظام الانتداب ، مثل محاولة ذات أهمية كبرى فى ميدان العلاقات الدولية إذ أنه يمثل أول تدخل من جانب المنظمات الدولية محل المشكلة الاستعمارية إلا أن هذا النظام كان ناقصاً ومعيباً إذا ما لاحظنا ما يلى [1] :

(أ) إن نظام الانتداب لم يطبق تطبيقاً عاماً على كل المستعمرات وإنما طبق فقط على مستعمرات الدول التى انهزمت فى الحرب العالمية الأولى ، فلم يطبق على مستعمرات الحلفاء ولا على مستعمرات الدول التى لم تشترك فى الحرب .

(ب) إن توزيع الانتداب أوضح أن النسبة قد انصرفت إلى أن تتولى إدارة مستعمرات الأعداء الدول التى انتصرت فى الحرب العالمية الأولى وبصفة خاصة فرنسا وإنجلترا ، مما قد يوحى بأن الأمريكان عبارة عن مجرد توزيع الأسلاب والمغانم .

(ج) إن رقابة عصبة الأمم على الإدارة فى الأقاليم الموضوعة تحت الانتداب كانت رقابة وهمية بحيث أن الدول التى تمارس الانتداب تتصرف فى تلك الدول والأقاليم الموضوعة تحت الانتداب كانت رقابة وهمية بحيث أن الدول التى تمارس الانتداب تتصرف فى تلك الدول والأقاليم كما لو كانت تتصرف فى مستعمراتها وبهذا تحول نظام الانتداب إلى نظام استعمارى بغيض ولا أزل على ذلك من تصرفات بريطانيا فى فلسطين [2] الموضوعة تحت انتدابها ،

---

(1) راجع فى نظام الانتداب مؤلفنا (مبادئ القانون الدولى العام سنة ١٩٦٤) ص ٢٥٤ وما بعدها .

(2) كانت فلسطين حينما وضعت تحت الانتداب البريطانى دولة عربية مسكونة بشب أهل للاستقلال وحينما انتهى الانتداب البريطانى على فلسطين فى سنة ١٩٤٨ كان الشعب الفلسطينى قد تحول إلى شعب من اللاجئين ونشأت إسرائيل .

ومن تصرفات فرنسا فى سوريا ومن تصرفات اتحاد جنوب أفريقيا فى إقليم جنوب غرب أفريقيا[1].

رابعاً : موقف الأمم المتحدة من المشكلة الاستعمارية

١ ــ سلطات الأمم المتحدة وفقاً للفصل الحادى عشر من الميثاق[2] :

احتوى الفصل الحادى عشر من ميثاق الأمم المتحدة على تصريح يتعلق بالأقاليم غير المتمتعة بالحكم الذاتى ، ولقد أورد ذلك التصريح مجموعة من المبادئ الأساسية التى تحكم إدارة المستعمرات والأقاليم غير المستقلة بصفة عامـــة .

فنصت المادة الثالثة والسبعون على أن أعضاء الأمم المتحدة الذين يضطلعون فى الحال أو فى الاستقبال بتبعات عن إدارة أقاليم لم تنل شعوبها قسطاً كاملا من الحكم الذاتى يعترفون بالمبدأ الذى يقضى بأن مصالح سكان هذه الأقاليم لها المقام الأول ، ويقبلون أمانة مقدسة فى عنقهم الالتزام بالعمل على تنمية رفاهية أهل هذه الأقاليم إلى أقصى مستطاع فى نطاق السلم والأمن الدولى الذى رسمه الميثـــاق .

وهكذا أوضح ميثاق الأمم المتحدة أن إشراف الدول على المستعمرات ليس للحصول على المغانم أو اكتساب الحقوق بل هى واجب يؤدونه لصالح أهلهـــا .

كما بينت المادة ٧٣ من ميثاق الأمم المتحدة أن الغرض من مباشرة الإدارة فى الأقاليم التابعة يتلخص فى النقط التالية .

١ ــ كفالة تقدم شعوبها فى شئون السياسة والاقتصاد والاجتماع والتعليم ، ومعاملتها بانصاف وحمايتها من ضروب الإساءة كل ذلك مع مراعاة ثقافة هذه الشعوب .

---

(١) أعلن اتحاد جنوب أفريقيا عن عزمه على ضم إقليم جنوب غرب أفريقيا إليه .
(٢) لن نتعرض فيما يلى لنظام الوصاية الذى طبق على فئات محدودة من الأقاليم .

٢ — إنماء الحكم الذاتى وتقدير الأمانى السياسية لشعوب تلك الأقاليم ومعاونتها على إنماء نظام السياسة الحرة .

٣ — توطيد السلم والأمن الدولى .

٤ — تعزيز التدابير الإنشائية للرقى والتقدم وتشجيع البحوث وتحقيق تعاون تلك الأقاليم مع المنظمات الدولية .

وصرحت الدول أعضاء الأمم المتحدة فى نفس المادة بأنها سوف تقوم بارسال بيانات منتظمة للأمين العام للأمم المتحدة لإحاطته علماً بالاحصاءات والبيانات الفنية المتعلقة بأمور الاقتصاد والاجتماع والتعليم فى الأقاليم التابعة — ولكن الميثاق وقف عند حد تقرير المبادئ العامة فلم يضع رقابة قوية على تصرفات الدول فى الأقاليم التابعة ولم يبين وسيلة ما يلجأ إليها سكان تلك الأقاليم للتظلم من تصرفات الدولة الاستعمارية . ومع هذا فلا جدال فى أن مسألة الإدارة فى المستعمرات قد خرجت من دائرة القانون الداخلى لكى تدخل فى الوقت الحالى فى نطاق المسائل الدولية التى تخضع لرقابة أجهزة الأمم المتحدة فى حدود الاختصاصات العامة المقررة لمجلس الأمن وللجمعية العامة .

فاذا ترتب على إدارة الدولة لإقليم تابع لها بطريقة تخالف التزاماتها بمقتضى الميثاق اخلال بالسلم والأمن الدولى كان لمجلس الأمن أن يتدخل ليتخذ الإجراءات الملائمة . كما أن الجمعية العامة للأمم المتحدة هى السلطة المختصة بمناقشة الأحوال فى الأقاليم التابعة . ولقد عارضت الدول الاستعمارية حق الجمعية العامة فى مناقشة المعلومات المتعلقة بتلك الأقاليم ، ولكن الجمعية العامة أكدت سلطتها على أساس أنها تختص بكل المسائل التى تدخل فى حدود ميثاق الأمم المتحدة[1] .

---

(١) راجع الفصل الرابع من ميثاق الأمم المتحدة . ولقد ألفت الجمعية العامة لجنة فرعية تسمى لجنة المعلومات عن الأقاليم غير المتمتعة بالحكم الذاتى وتتولى هذه اللجنة بحث البيانات والمعلومات التى تصلها من الدول وتقدم تقريراً عنها للجمعية العامة فى دورتها السنوية .

٢ – قرار تصفية الاستعمار سنة ١٩٦٠ :

نجحت الجمعية العامة بفضل مجهود الدول الآسيوية والأفريقية فى فرض رقابة فعالة لصالح شعوب المستعمرات وزيادة على ذلك فلقد قامت فى ١٤ ديسمبر سنة ١٩٦٠ باصدار قرار تاريخى يدعو لتصفية الاستعمار بجميع صوره ومظاهره دون قيد أو شرط ويدعو القرار الدول المسئولة عن إدارة أقاليم غير مستقلة إلى أن تتخذ التدابير الفورية اللازمة فى الأقاليم المشمولة بالوصاية أو الأقاليم غير المتمتعة بالحكم الذاتى أو أية أقاليم أخري لم تنل استقلالها بعد لنقل جميع السلطات إلى شعوب تلك الأقاليم دون قيد أو شرط ووفقاً لإرادة هذه الشعوب وللرغبات التى عبرت عنها بحرية وبدون تحيز بسبب الجنس أو العقيدة أو اللون .

ولقد أوردت الجمعية العامة فى هذا القرار التاريخى مجموعة من المبادئ الأساسية المتصلة بالمشكلة الاستعمارية وهى كما يلى :

١ – إن خضوع الشعوب للاستعباد الأجنبى أو سيطرته أو استغلاله يعتبر انكاراً لحقوق الإنسان الأساسية ويناقض ميثاق الأمم المتحدة ويهدد قضية السلام والتعاون الدولى .

٢ – لجميع الشعوب الحق فى تقرير مصيرها ولها بمقتضى هذا الحق أن تحدد بحرية نظامها الأساسى وأن تسعى فى ظل هذه الحرية إلى تحقيق نموها الاقتصادى والاجتماعى والثقافى .

٣ – يجب ألا يتخذبأي حال تخلف الإقليم فى الميدان السياسى أو الاقتصادى أو الاجتماعى أو التعليمى ذريعة لتأخير الاستقلال .

٤ – يجب وضع حد لجميع أنواع الأعمال المسلحة أو أعمال القمع التى توجه ضد الشعوب غير المستقلة حتى تتمكن من أن تمارس فى سلام وحرية حقها فى الاستقلال التام وتضمن سلامة إقليمها الوطنى .

٥ – منع كل محاولة القصد منها المساس بالوحدة القومية أو بسلامة الإقليم .

ومع أن قرار الجمعية العامة بشأن تصفية الاستعمار جاء واضحاً من حيث مبادئه وأهدافه إلا أنه خلا من تحديد أجل يصفى فى خلاله الاستعمار ، كما أنه لم يتعرض إلى بيان وسائل تنفيذه . ولهذا أصدرت الجمعية العامة فى ٢٨ نوفمبر سنة ١٩٦١ قراراً أبدت فيه الأسف لأن قرارها بشأن تصفية الاستعمار لم يتم تنفيذه ، كما أنشأت لجنة خاصة مكونة من سبع عشرة دولة مهمتها دراسة تطبيق ذلك القرار وتقديم اقتراحاتها وتوصياتها بشأن ذلك . وبين القرار أن على اللجنة أن تباشر عملها فى حدود الوسائل التى تكون تحت تصرفها وعلى أن يقوم مجلس الوصاية ولجنة المعلومات عن الأقاليم غير المتمتعة بالحكم الذاتى والوكالات المتخصصة بالتعاون مع اللجنة .

ولقد مارست لجنة تصفية الاستعمار المهمة الموكولة لها عن طريق الاتصال بالدول القائمة بالإدارة فى المستعمرات ، وسمحت لسكان المستعمرات والأقاليم التابعة بالتقدم لها بعرائض شفوية ومكتوبة ونظمت بعثات لزيارة تلك الأقاليم كما تقدمت بتوصيات موضوعية بشأن الأحوال فى بعض الأقاليم ومستقبلها .

ولا ريب فى أن الحاجة أصبحت ماسة لكى تقوم الأمم المتحدة ببعض الإجراءات الإيجابية بقصد تحديد أجل نهائى لتصفية الاستعمار ، ولكى تمارس ضغطاً فعالا على الدول الاستعمارية التى تتلكأ فى تنفيذ قرارات الأمم المتحدة[1]

(١) راجع مؤلفنا عن الأمم المتحدة سنة ١٩٦٤ ص ١٣٦ وما بعدها.

المبحث الثانى

الوضع الدولى لعدن ومحميات عدن ولاتحاد الجنوب العربى

أولا — تطور الوضع الدولى لعدن

١ — مقدمة :

تقع عدن على الساحل الجنوبى لشبه الجزيرة العربية على بعد ١٠٠ ميل شرق بوغاز باب المندب وتبلغ مساحتها ١٩٤ كيلو متر مربع .

وحتى سنة ١٩٥٩ كانت جزيرة بريم الواقعة فى بوغاز باب المندب وجزر كوريا موريا المواجهة لساحل عمان تعتبر جزءاً من مستعمرة عدن ، ولكن ابتداء من ذلك التاريخ تم فصل هذه الجزر عن عدن مع إدارتها مباشرة بواسطة حاكم عدن .

أما جزيرة قمران الواقعة فى البحر الأحمر تجاه الساحل اليمنى فهى تدار مباشرة بواسطة حاكم عدن مع عدم اعتبارها جزءاً من عدن أو من محميات عـــدن .

ويبلغ عدد سكان عدد حوالى ٢٢٠ ألف نسمة ، وسكانها من العرب على أن الاستعمار البريطانى فتح أبواب عدن أمام الهجرة الأجنبية حتى أن الاحصاء الذى نشرته الأمم المتحدة عن سكان عدن فى سنة ١٩٥٥ يشير إلى النسب الآتية من حيث جنس السكان .

٧٥,٢	من العرب .
١١,٤	من الهنود والباكستانيين .
٧,٧	من الصوماليين .
٣,٢	من الأوروبيين .
٢,٥	من جنسيات أخري .

(١) راجط تقرير اللجنة الخاصة بحالة تنفيذ إعلان تصفية الاستعمار الصادرة من الجمعية العامة للأمم المتحدة الوثيقة رقم A/5446/ Add.4 بتاريخ ٨ أكتوبر سنة ١٩٦٤ ص ٤ .

٢ ـ الاستعمار البريطاني في عدن :

بدأت بريطانيا منذ أواخر القرن الثامن عشر تتجه بأبصارها نحو اليمن[١] وبصفة خاصة نحو الأراضي الواقعة في جنوب الجزيرة العربية والمتاخمة لبوغاز باب المندب نظراً لأهميتها الأستراتيجية والتجارية ولوقوعها في الطريق إلى الهند .

وقامت بريطانيا في سنة ١٧٩٩[٢] باحتلال جزيرة بريم الواقعة في بوغاز باب المندب ثم أخذت تعمل على احتلال عدن . وفي سنة ١٨٣٩ تم لبريطانيا الاستيلاء على عدن بعد معركة أن تمكنوا من هزيمة سلطان لحج الذي كان يعتبر عدن عاصمة لسلطنته وا كراه السلطان على نقل عاصمته خارج عدن.

ولقد حددت بريطانيا وضع عدن فاعتبرتها جزءاً من مستعمرة الهند البريطانية واستمر هذا الوضع قائماً حتى سنة ١٩٣٧ وفي هذا التاريخ تقرر اعتبار عدن مستعمرة منفصلة تابعة للتاج البريطاني مباشرة . وبذلك انفصلت عدن عن حكومة الهند .

وأقامت بريطانيا في عدن قاعدة عسكرية ذات أهمية استراتيجية كبرى بالنسبة لمصالحها الاستعمارية في العالم العربي وفي أفريقيا وفي آسيا[٣] .

ولقد استمرت عدن تعتبر مستعمرة بريطانيا منفصلة عن باقي مناطق اليمن وجنوب الجزيرة العربية حتى ١٨ يناير سنة ١٩٦٣ حينما تقرر انضمامها إلى اتحاد الجنوب العربي مع احتفاظها بوضع المستعمرة .

٣ ـ النظام الدستوري الداخلي لعدن :

يتضح من النظام الدستوري الداخلي لعدن الذي أصدرته بريطانيا في سنة ١٩٦٢ أن مستعمرة عدن وهي تخضع للسلطة الاستعمارية البريطانية العليا الممثلة في حكومة لندن تدار على النحو الآتي :

---

(١) سبق ذلك محاولات بذلتها البرتغال منذ أوائل القرن السادس عشر لبسط نفوذها على هذه المناطق مما أدى إلى استنجاد شعبها بالخليفة العثماني الذي استطاع بعد فتح مصر في سنة ١٥١٧ أن يجهز أسطولا قام من مصر واحتل عدن في سنة ١٥٣٨ .

(٢) كان ذلك في السنة التالية لوصول الفرنسيين لمصر سنة ١٧٩٨ .

(٣) انظر في أهمية قاعدة عدن لبريطانيا مؤلف — Norman Hill Contemporary World Politics. نيويورك سنة ١٩٥٤ ص ٣٣٥ .

(أ) المندوب السامى البريطانى لعدن ومحميات الجنوب العربى :

هو الرئيس الإدارى الأعلى ، وتجب موافقته على كل تشريع ينفذ فى مستعمرة عدن[1] .

(ب) مجلس وزراء عدن :

ويتكون من سبعة وزراء على الأقل يسمى أحدهم رئيس الوزراء ، ويعتبر النائب العام عضواً فى مجلس الوزراء .

ويقوم المندوب السامى بتعيين رئيس الوزراء ، كما يقوم بتعيين باقى الوزراء بترشيح من رئيس الوزراء .

ويقوم المندوب السامى بمشاورة الوزراء فى السياسة العامة وفى ممارسته سلطته فيما عدا المسائل المتصلة بالسياسة الخارجية والدفاع والأمن الداخلى والبوليس فهذه المسائل تخرج عن نطاق اختصاص مجلس الوزراء .

(ج) المجلس التشريعى :

يتكون من ١٦ عضواً منتخباً ، وستة يعينهم المندوب السامى والنائب العام ويقوم المندوب السامى بالتشريع بموافقة المجلس التشريعى ومشورته . على أن المجلس التشريعى لا يستطيع التشريع فى المسائل الآتية : المسائل المالية المرافق العامة ، السياسة الخارجية — الدفاع — الأمن — البوليس — المسائل التى تدخل فى اختصاص النائب العام .

ومن الواضح أنه مع تقييد سلطات المجلس التشريعى على هذا النحو ، ومع كون المجلس ينتخب فى ظل قانون انتخابى معيب يحرم عدداً كبيراً من السكان العرب من حق الانتخاب والترشيح بينما يعطى هذا الحق للرعايا البريطانيين المقيمين فى عدن — فإنه لا يمكن القول بتمتع مستعمرة عدن حتى بنظام ديمقراطى للحكم الذاتى[2] .

(١) إن تسمية المندوب السامى قد توحى بأنه يمثل دولة لدى دولة أخرى ولكن هذا غير صحيح لأنه ليس مجرد ممثل لدولة أجنبية هو الحاكم الفعلى لعدن .

(٢) انظر تقرير لجنة تصفية الاستعمار التابعة للأمم المتحدة عن الفترة من ٢٠ فبراير إلى ١٩ سبتمبر سنة ١٩٦٢ الوثيقة ج . ع — ٥٢٣٨ ص ٥٠٠ وما بعدها .

ثانياً — الاستعمار البريطـــانى فى محميات عـــدن

تمكنت بريطانيا منذ النصف الثانى من القرن التاسع من أن تمد نفوذها الاستعمارى على المناطق الموجودة خارج عدن فى جنوب اليمن . وكانت وسيلتها فى ذلك إبرام اتفاقيات الحماية الاستعمارية على مشايخ وسلاطين القبائل التى تسكن فى هذه المناطق — كما مدت بريطانيا حمايتها الاستعمارية على مناطق الخليج العربى .

على أن اصطلاح محميات عدن يطلق فقط فى العرف الاستعمارى البريطانى على المحميات المحميات التى تقع فى منطقة تحدها من الشرق سلطة مسقط وعمان ومن الغرب والشمال اليمن والمملكة العربية السعودية .

ويبلغ عدد هذه المحميات خمس وعشرون محمية ويطلق اصطلاح المحميات الشرقية على خمس محميات وهى المهرة،والسلطنة القعيطية والسلطنة الكثيرية و(حضرموت) والسلطنة الواحدية ، ومشيخة عرفه ومشيخة صورة .

أما المحميات الغربية فأهمها :

العوالق السفلى ، ويافع العليا ، ويافع السفلى ، ونقابة المتوسطة ، والصبى والعقارب ، والمفالحة ، والأقوشى ، والسفالة ، والقطيبى ، ورثينه ، وعله ، والضالع ، وردفان ، وبيجان ، والعوادل ، والعلوى .

ويبلغ عدد سكانها أكثر من مليون شخص .

وتتشابه اتفاقات الحماية التى أبرمتها بريطانيا مع المشايخ وسلاطين هذه المناطق فى أنها تنص على أن تتولى بريطانيا إدارة علاقات هذه المحميات الخارجية.

ومن الواضح أن هذه الاتفاقيات الاستعمارية لا تعد معاهدات دولية بالمعنى الصحيح وذلك لأن المعاهدات لا تكون إلا بين الدول ، والقبائل والمشيخات المشار إليها لم تكن دولا معترفاً بوجودها ولم تكن تتمتع بالشخصية الدولية أو بحق إبرام المعاهدات وعلى ذلك فان هذه الاتفاقيات لا تنتج التزامات قانونية دولية بالمعنى الصحيح ، ويكون الوجود البريطانى فى تلك المناطق

ظاهرة استعمارية تستند إلى مجرد القوة والتهديد وزيادة على ذلك فان اليمن تعارض فى شرعية هذه الاتفاقيات على أساس أن المحميات كانت جزءاً من اليمن ، وأن تصرفات المشايخ لا تلزم الحكومة اليمنية .على أن سياسة الحكومة اليمنية فى ظل حكم الإمامة كانت تتسم بالضعف وكان من مظاهر ذلك ابرام معاهدة صنعاء سنة ١٩٣٤ بين بريطانيا وبين اليمن وهى تنص على الصداقة والمودة بين الدولتين وعلى أن تسوى المشاكل بينهما بواسطة لجنة مشتركة مع بقاء الأوضاع على ما هى عليه وقت إبرام المعاهدة .

ولقد قامت بريطانيا منذ سنة ١٩٣٦ بتكملة اتفاقيات الحماية عن طريق إبرام ما أسمته باتفاقيات الاستشارة مع سلاطين ومشايخ المحميات . وتقرر اتفاقيات الاستشارة حق بريطانيا فى إصدار المشورة والنصيحة إلى السلاطين والمشايخ عن طريق من تعينهم لهذا الغرض من الضباط السياسيين كما تقرر هذه الاتفاقات التزام المشايخ والسلاطين باتباع النصائح الموجهة لهم .

ثالثاً — اتحاد الجنوب العربى

١ — تكوين الاتحاد :

بدأت بريطانيا تعمل منذ سنة ١٩٥٤ على ادماج بعض محميات الجنوب العربى التى ترتبط معها باتفاقات الحماية والاستشارة فى اتحاد فدرالى .

وكان الهدف من ذلك تكوين كيان سياسى عربى يأخذ شكلا فدرالياً فى تلك المنطقة الهامةمن العالم العربى ويخضع هذا الكيان للنفوذ البريطانى ويعمل على تنفيذ السياسة البريطانية [٢] كما يوجه إلى معارضة الدول العربية المتحررة .

---

(١) لم تكن الدولة العثمانية تمارس سيادة مستقرة على اليمن ، فلقد استطاعت اليمن أن تتحرر من النفوذ العثمانى لمدة قرنين من الزمان على أن السيادة العثمانية على اليمن عادت فى القرنين التاسع عشر والعشرين منضمة للأمامة اليمنية ولقد بدأت الدولة العثمانية فى القرن العشرين تفصل لواء اليمن عن إمارات الجنوب وأخذت تعطى لبريطانيا بعض مظاهر السلطة فى الجنوب . ثم جاءت معاهدة لوزان سنة ١٩٢٣ وصفت الوجود العثمانى فى اليمن والجنوب بصفة عامة .

(٢) بدأت بريطانيا منذ سنة ١٩٣٤ تعمل على تجميع الكيانات الهزيلة التى شجعت نموها فى الجنوب العربى وذلك لتيسير حكم هذه المناطق وتسهيل أمر التصرف فى شئونها وبصفة خاصة بعد أن بدأت أمريكا تحصل على امتيازات بترولية فى الجزيرة العربية .

ولما قامت الجمهورية العربية المتحدة نتيجة لاندماج سوريا سوريا ومصر فى سنة ١٩٥٨ سارعت بريطانيا بتنفيذ مشروع اتحاد الجنوب العربى حتى تستطيع مواجهة تزايد خطر حركة القومية العربية وامتداد آثارها إلى مناطق الجنوب العربى[١].

وفى ١١ فبراير سنة ١٩٥٩ أعلن تكوين اتحاد الجنوب العربى من المحميات الآتية :

امارة بيجان — سلطنة العودلى — سلطنة الفاضلى — إمارة الضالع — مشيخة العوالق العليا — سلطنة العوالق السفلى — سلطنة يافع السفلى — سلطنة لحج — دولة وثينة — مشيخة العقربى — سلطنة الواحدى .

ولما قامت ثورة اليمن الجمهورية فى ٢٦ سبتمبر سنة ١٩٦٢ عملت بريطانيا على تدعيم اتحاد الجنوب العربى لمقاومة اتجاهات الثورة التحريرية ولدعم انفصال الجنوب عن اليمن . فتقرر ضم مستعمرة عدن إلى الاتحاد فى ١٨ يناير سنة ١٩٦٣ ، كما انضمت له مشيخة الشعيبى ومشيخة الحوشبى فى ٢١ مارس سنة ١٩٦٣ .

٢ — النظام الدستورى لاتحاد الجنوب العربى :

نص دستور الاتحاد الصادر فى سنة ١٩٥٩ على تشكيل الأجهزة الاتحادية الآتيـــة :

(أ) المجلس الأعلى :

وهو السلطة التنفيذية الاتحادية ويتكون من ستة وزراء منتخبين بواسطة المجلس الاتحادى . ويتولى المجلس الأعلى مسئولية تنفيذ القوانين الاتحادية .

---

(١) لم تنس بريطانيا أن الجيش المصرى وصل إلى هذه المناطق فى سنة ١٨٤٨ .

(ب) المجلس الاتحادى :

ويتكون من ستة ممثلين عن كل عضو فى الاتحاد يختارهم كل عضو بمعرفته ووظيفته التشريعية بالاشتراك مع المجلس الأعلى .

ويتم التشريع بالطريقة الآتية :

يقوم المجلس الأعلى باقتراح التشريعات وتجب موافقة المجلس الاتحادى عليها وللمجلس الاتحادى أن يعدلها بطريقة مقبولة من المجلس الأعلى .

ولقد تم تعديل دستور الاتحاد بمناسبة انضمام عدن إليه فى سنة ١٩٦٣ ووفقاً للتعديل يتشكل المجلس الأعلى من ممثل عن كل ستة أعضاء فى المجلس الاتحادى ويتشكل المجلس الاتحادى من ستة ممثلين عن كل عضو فى الاتحاد فيما عدا عدن التى يمثلها ٢٤ عضواً يختارهم المندوب السامى البريطانى .

وتقرر إنشاء محكمة اتحادية لتفسير الدستور وللفصل فى الخصومات بين الأعضاء كما تقرر إنشاء مجلس للمرافق العامة للاشراف على المرافق المشتركة .

ونص التعديل الدستورى على أنه يجوز لبريطانيا فى أى وقت أن تقرر إخراج عدن أو أى جزء منها من نطاق الاتحاد .

٣ ــ تبعية الاتحاد لبريطانيا :

يرتبط اتحاد الجنوب العربى بمعاهدة حماية وصداقة أبرمت مع بريطانيا فى سنة ١٩٥٩ .

ووفقاً لنصوص هذه المعاهدة يكون لبريطانيا مسئولية إدارة العلاقات الخارجية للاتحاد كما يكون لها الحق فى الاحتفاظ بقاعدة عسكرية بريطانية .

ويجب على الاتحاد أن يستمع إلى النصائح التى تقدمها له الحكومة البريطانية وتقوم بريطانيا بمعاونة الاتحاد فى شئون الدفاع والتنمية وفى العمل على تكوين دولة مستقلة .

ومما لا شك فيه أن هذه المعاهدة تفرض استعماراً بريطانياً شديد الوطأة على تلك المنطقة العربية . ولقد حاولت بريطانيا إخفاء استعمارها لتلك المنطقة

تحت ستار من الكيانات السياسية الهزيلة ومن الأنظمة القانونية والواقعية المعقدة على أن كل هذه الحيل القانونية والدستورية والتعاون مع المشايخ والسلاطين الذين لا يملكون من أمرهم شيئاً ولا يستطيعون التصرف فى شئون كياناتهم المصطنعة بحرية لم يترتب عليه ارضاء الشعور القومى الدافق فى تلك المنطقة من جنوب اليمن . كما أنه ينافى حق الشعور فى تقرير مصيرها ويعارض حقوق الإنسان فضلا عن أنه سبب من أسباب اضطراب السلم والأمن الدولى وعاملا من عوامل التأخر والفساد .

ومن العبث محاولة تكييف الطبيعة القانونية لاتحاد الجنوب العربى — لأن طبيعة أى اتحاد تتضح من فحص طريقة توزيع مظاهر السيادة الداخلية والخارجية بين أعضاء الاتحاد . ومن الواضح أن اتحاد الجنوب العربى محروم هو وأعضاؤه من مظاهر السيادة الخارجية فضلا عن تدخل بريطانيا فى شئونه الداخلية . وعلى هذا يكون اتحاد الجنوب العربى ظاهرة استعمارية من الظواهر الكثيرة والمتعددة التى ظهرت فى الوجود فى العصر الحديث . وهو ليس مظاهرة اتحادية بالمعنى الصحيح لأنه الظواهر الاتحادية مؤسسة على الحرية وعلى حق تقرير المصير .

رابعاً — تصفية الاستعمار من عدن والمحميات

كانت ثورة اليمن فى ٢٦ سبتمبر سنة ١٩٦٢ إيذاناً بحدوث تطورات سياسية واجتماعية واسعة المدى فى جنوب الجزيرة العربية . ولقد كان موقف الحكومة الإمامية من قضية الجنوب موقفاً مائعاً يتسم بالسلبية ، فلقد اكتفت تلك الحكومة بمطالبات مظهرية لاستعادة تلك المناطق دون أن تقوم بوضع خطة عملية أو تعمد لإثارة الموضوع أمام الأمم المتحدة[1] .

ولقد وقفت حكومة الجمهورية العربية اليمنية موقفاً إيجابياً من هذه

(١) أصدرت الجامعة العربية أكثر من عشرين قراراً تؤيد فيها حق اليمن فى الجنوب العربى المحتل وذلك فى الفترة من سنة ١٩٥٤ إلى سنة ١٩٥٧ .

المشكلة الحيوية بقصد استعادة وحدة أراضيها ومنع التهديد الموجه لها من الاستعمار وعملائه فى الجنوب المحتل .

وفى ٢٩ نوفمبر سنة ١٩٦٢ طالب مندوب الجمهورية المتحدة فى الجمعية العامة للأمم المتحدة بأعمال قرار تصفية الاستعمار الصادر فى سنة ١٩٦٠ فى الجنوب العربى .

١ ـ تشكيل لجنة تقصى الحقائق فى عدن :

قامت لجنة الأمم المتحدة الخاصة بتنفيذ قرار تصفية الاستعمار بدراسة مشكلة عدن ومحمياتها فى الفترة من ١٧ أبريل إلى ١٠ مايو سنة ١٩٦٣ وقامت بسماع الشكاوى والعرائض المقدمة من ممثلى سكان المنطقة . ولقد أصدرت اللجنة قراراً فى ٣ مايو سنة ١٩٦٣[1] لاحظت فيه عدم تطبيق قرار تصفية الاستعمار فى عدن ومحمياتها وأن الأوضاع الدستورية السائدة فى هذه المناطق تتعارض مع نصوص ذلك القرار القاضى بمنح الاستقلال للشعوب والمناطق غير المستقلة . كما سجلت اللجنة اهتمامها بالأوضاع السائدة فى عدن ومحمياتها نتيجة لانكار الحقوق السياسية واعتقال الزعماء الوطنيين وهى أوضاع يؤدى استمرارها إلى تعرض أمن الجنوب العربى وسلامته للخطر واعترفت اللجنة بحق شعب هذه المناطق فى تقرير مصيره والتحرر من الحكم الاستعمارى .

وأوصت اللجنة بمنح شعب هذه المناطق فرصة لاختيار مستقبلة فى ظل ظروف الديمقراطية والحرية .

وطالبت اللجنة حكومة المملكة المتحدة بأن تطلق سراح جميع المعتقلين السياسيين وأن تسمح بعودة جميع الزعماء السياسيين المنفيين المبعدين وأن تلغى القيود على النشاط السياسى وأن تؤمن الحريات السياسية وحقوق الإنسان .

كما قررت اللجنة تشكيل لجنة فرعية لتقصى الحقائق فى عدن والمحميات

(١) راجع نص القرار فى وثيقة الأمم المتحدة بتاريخ أول يوليو سنة ١٩٦٣ وهى صادرة من لجنة تصفية الاستعمار ، ص ٤ من الوثيقة .

على أن يكون للجنة الفرعية سلطة زيارة المناطق المجاورة الأخرى إذا ما كان ذلك لازماً . وعلى اللجنة الفرعية أن تتقصى وجهات نظر السكان وبصفة خاصة ممثلى الأحزاب السياسية وزعمائها كما تجرى مباحثات مع السلطات الحاكمة . وأعربت اللجنة عن أملها فى أن تتعاون السلطات الحاكمة مع اللجنة الفرعية التى يكون عليها أن تقدم تقريرها فى تاريخ لا يجاوز ١٠ يونيه سنة ١٩٦٣ بشأن توصياتها المتعلقة بالتنفيذ العاجل لنصوص الاعلان العالمى الخاص بمنح الاستقلال لكافة الشعوب والمناطق غير المستقلة .

وفى ١٠ مايو سنة ١٩٦٣ أصدر رئيس لجنة تصفية الاستعمار قراراً بتشكيل اللجنة الفرعية لعدن على النحو الآتى . مستر سون من كامبوديا رئيساً والسادة عدنان الباجهجى من العراق ، أندريا ماهارو من مدغشقر ، وكونزلوس من فنزويلا ، وبافيسيفيك من يوجوسلافيا أعضاء .

٢ ــ نشاط اللجنة الفرعية :

يعتبر قرار لجنة تصفية الاستعمار بارسال لجنة فرعية لتقصى الحقائق فى عدن أول قرار من نوعه خولت فيه اللجنة بعض أعضائها بزيارة إقليم من الأقاليم التى تهتم بها ، ولقد كان من شأن ذلك احساس اللجنة بأهمية دورها وبما يعلقه الرأى العام العالمى عليها من آمال .

ولقد أحست اللجنة بأن أول واجب لها هو القيام بزيارة لعدن والمحميات لكى تتعرف بنفسها على حقائق الأحوال هناك، ولهذا أسفت اللجنة أشد الأسف لما أظهره مندوب بريطانيا فى لجنةتصفية الاستعمار من معارضة لزيارة البعثة لعدن والمحميات .

ولقد استندت معارضة بريطانيا علىالقول بأن مسئولية إدارة المناطق غير المتمتعة بالحكم الذاتى تظل ملقاة على عاتق السلطة القائمة بالإدارة دون ما مشاركة من جانب أية سلطة أخرى لأن تقسيم السلطة سوف يؤدى إلى الفوضى والارتباك .

ولهذا أعلنت بريطانيا تمسكها بسلطتها كاملة واعتقادها أن زيارة البعثة لعدن والمحميات يعتبر بمثابة تدخل فى الشئون الداخلية لهذا الإقليم .

على أن هذه الحجة البريطانية لا تتفق مع التفسير السليم لميثاق الأمم المتحدة ولمسئوليات الجمعية العامة للأمم المتحدة بموجب الفصل الحادى عشر لن الميثاق وبموجب قرار تصفية الاستعمار بتاريخ ١٤ ديسمبر سنة ١٩٦٠ والقرارات اللاحقة له بتاريخ ٢٧ نوفمبر سنة ١٩٦١ وبتاريخ ١٧ ديسمبر سنة ١٩٦٢ ومن الثابت أن الإدارة فى الأقاليم غير المتمتعة بالحكم الذاتى قد خرجت بموجب تلك النصوص عن نطاق الاختصاص الداخلى للدول[1] إذ أنه قد نشأت التزامات دولية فى هذا الشأن ، كما منح ميثاق الأمم المتحدة الجمعية العامة نطاق خاصة فيما يتعلق بالرقابة على الإدارة فى المستعمرات كما أعطاها قرار تصفية الاستعمار والقرارات المكملة له مسئوليات خاصة فيما يتعلق بالتأكد من سرعة منح الاستقلال للأقاليم غير المستقلة[2] .

وزيادة على ذلك فلا يمكن القول بأن زيارة اللجنة الفرعية للجنوب يؤدى إلى الفوضى والارتباك ، وذلك لأن من واجب السلطة القائمة بالإدارة أن تتعاون مع الأجهزة التى أنشأتها الأمم المتحدة لتحقيق أغراض معينة وهى أجهزة تفيد فى تحقيق أهداف الأمم المتحدة وفى المحافظة على السلام والأمن .

ولقد حاولت اللجنة الفرعية إقناع الحكومة البريطانية بالعدول عن موقفها ولكن تلك المحاولة تكلل بالنجاح فلقد أصرت تلك الحكومة على معارضتها لزيارة اللجنة لعدن وأصدرت أوامرها بعدم السماح لأعضائها بالدخول فى المحميات .

وإزاء هذا الإصرار على رفض تنفيذ قرار لجنة تصفية الاستعمار قررت اللجنة الاكتفاء بزيارة الدول المجاورة للمنطقة والتى يوجد بها عدد من رعايا عدن والمحميات .

---

(١) راجع مؤلفنا (مبادئ القانون الدولى العام) سنة ١٩٦٤ ص ٢٥٧ وما بعدها .
(٢) رفضت أغلبية أعضاء اللجنة وجهة نظر بريطانيا .

ولقد قامت اللجنة بزيارة كل من الجمهورية العربية المتحدة واليمن والمملكة العربية السعودية والعراق فى الفترة من ٢٥ مايو إلى ٥ يونيو ١٩٦٣ واستطاعت اللجنة الاكتفاء بعدد كبير من ممثلى سكان عدن والمحميات ، كما تلقت عدداً من العرائض والبيانات والوثائق .

ولقد أشار تقرير اللجنة إلى ملخص للأحوال فى عدن والمحميات كما عرضها عليها من استمعت لهم من أشخاص . ولقد بين التقرير بصفة خاصة معارضة ممثلى الشعب لوجودة قاعدة عسكرية فى بلادهم تعتبر تهديداً موجها ضد العالم العربى والمنطقة ، كما بين التقرير كيف أن بريطانيا عمدت إلى تقسيم المنطقة إلى ٢٥ وحدة سياسية وإلى إنكار حقوق الإنسان ، وإلى اتباع سياسة القمع والارهاب وإلى قيام حكومات غير مشروعة ، وإلى أن نظام عدن الدستورى الجديد لم يغير من وضعها لمستعمرة ، وإلى أن مجلس عدن التشريعى لم يشكل بطريقة دمقراطية سليمة وإلى الفساد المتفشى فى الحكم والإدارة وإلى تحكم الاقطاعين والمستشارين البريطانيين وإلى أن اتحاد الجنوب العربى اتحاد مزيف فرضته بريطانيا كما أنه لم يغير من وضع تلك المناطق كمحميات بريطانية ، وإلى عدم انضمام كل الوحدات السياسية إلى هذا الاتحاد وإلى تقييد الحريات السياسية وحرية الصحافة والحريات النقابية ، وإلى إهدار الحريات الشخصية وحرية الاجتماع .

كما بينت اللجنة فى تقريرها الحقائق الآتية :

١ – إن جميع من استمعت لهم اللجنة يطالبون بانهاء الحكم الاستعمارى .

٢ – يوجد قلق كبير نشأ عن مشروعات بريطانيا لمنح الاستقلال للمنطقة فى ظل الأنظمة والحكومات الحالية .

٣ – يطالب الجميع بالوحدة الوطنية ولكنهم يعتبرون اتحاد الجنوب العربى اتحاد وهمى .

٤ – يؤمن الجميع ببطلان اتفاقيات الحماية المبرمة مع بريطانيا بما فيها اتفاقية ١٩٥٩ .

٥ ــ لاحظت اللجنة وجود حركة قوية تؤيد اتحاد المحميات مع اليمن ، وأن هذه الحركة تؤثر فى التطورات السياسية فى المنطقة .

٦ ــ يحتج الجميع على وجود القاعدة العسكرية البريطانية فى عدن .

وأوصت اللجنة فى نهاية تقريرها بما يلى :

١ ــ يجب السماح لأهل عدن ومحمياتها بممارسة حقهم فى تقرير مصيرهم واختيار مستقبلهم ويجب أن يتم ذلك شكل الاتصال والتشاور مع جميع السكان على أن يتم ذلك بأسرع ما يمكن وعلى أساس الاقتراع العام للبالغين .

٢ ــ يجب على السلطة القائمة بالإدارة أن تقوم بما يلى :

(أ) إلغاء كافة القوانين التى تحظر الاجتماعات العامة .

(ب) إطلاق سراح المعتقلين والمسجونين السياسيين .

(ج) السماح بعودة الأشخاص المنفيين أو المحرومين من حق العودة لبلادهم .

(د) الكف عن عمليات القمع ضد سكان المنطقة وبصفة خاصة العمليات العسكرية وقصف القرى بالقنابل .

٣ ــ يجب على السلطة القائمة بالإدارة حل الأجهزة التشريعية الحالية وأن تدخل التعديلات الدستورية اللازمة لإجراء انتخابات بقصد إقامة جهاز تمثيلى وحكومة نيابية لكل المنطقة .

٤ ــ إن وجود الأمم المتحدة أمر ضرورى سواء قبل الانتخابات أو بعدها ، ويتقرر هذا الوجود بقرار من الجمعية العامة للأمم المتحدة بناء على توصية اللجنة .

٥ ــ يجب أن تتم الانتخابات قبل إعلان الاستقلال الذى سيتقرر طبقاً للمشيئة الحرة للسكان .

٦ ــ يجب إجراء محادثات بين الحكومة التى تسفر عنها الانتخابات وبين السلطة القائمة بالإدارة وذلك بدون تأخير لتحديد موعد نيل الاستقلال وإجراءات نقل السلطات .

٣ – عرض الموضوع على الجمعية العامة للأمم المتحدة :

تم رفع تقرير اللجنة الفرعية إلى لجنة تصفية الاستعمار التى قامت بدراسته وأصدرت فى ١٩ يوليو سنة ١٩٦٣ قراراً أعربت فيه عن أسفها لعدم تعاون الحكومة البريطانية مع اللجنة الفرعية والتى سبقت الإشارة إليها . وطلبت اللجنة من السكرتير العام للأمم المتحدة أن يبلغ هذا القرار إلى السلطة القائمة بالإدارة .

وقد قامت لجنة تصفية الاستعمار برفع تقريرها للجمعية العامة للأمم المتحدة التى قامت بمناقشته فى شهر ديسمبر سنة ١٩٦٣ ، ولقد وافقت الجمعية العامة عليه فى ١١ ديسمبر سنة ١٩٦٣ وأكدت الجمعية العامة بصفة خاصة ما يلى :

(أ) حق شعب عدن والمحميات فى التحرر من الحكم الاستعمارى وتقرير المصير .

(ب) إن الاحتفاظ بالقاعدة البريطانية الحربية فى عدن يضر بالأمن فى تلك الجهات ومن ثم يكون الغاؤها العاجل أمراً مرغوباً فيه .

(ج) وجوب إلغاء القوانين المقيدة للحريات واطلاق سراح المعتقلين والمسجونين السياسيين والسماح بعودة المبعدين لنشاطهم السياسى والكف عن عمليات القمع .

(د) ضرورة ادخال تعديلات دستورية لإقامة أجهزة تمثيلية وحكومة مؤقتة على أساس رغبات السكان وبناء على انتخابات عامة حرة .

(هـ) دعوة السكرتير العام للأمم المتحدة بالتشاور مع اللجنة الخاصة ومع بريطانيا لكى يرتب وجوداً فعالا للأمم المتحدة قبل الانتخابات وأثنـــاءها .

---

(١) صدر القرار بأغلبية ٧٧ صوتاً ومعارضة ١٠ أصوات وامتناع ١١ صوتاً عن التصويت .

(خاتمـــة)

مما لا شك فيه أن قضية عدن ومحمياتها قد أخذت أبعاداً جديدة وبصفة خاصة بعد صدور قرار تصفية الاستعمار فى سنة ١٩٦٠ وبعد قيام الثورة اليمنية فى سنة ١٩٦٢ ولقد كان من نتيجة ذلك كله خروج تلك القضية من النطاق المحلى إلى النطاق العالمى كمشكلة دولية هامة تتدخل فيها الأمم المتحدة عن طريق إصدار قرارات والتقدم بتوصيات محددة . كما كان من نتيجة كل ذلك احساس بريطانيا بقرب أفول حكمها الاستعمارى فى تلك المنطقة ومحاولتها تغيير الموقف عن طريق ادخال تعديلات دستورية تهدف إلى محاولة الاحتفاظ لها بالسلطة عن طريق التعاون مع المشايخ والسلاطين[1].

ومع أننا نؤمن أن إخراج بريطانيا من هذه المنطقة يعتمد فى أول الأمر على كفاح الشعب فى عدن والمحميات وفى اليمن إلا أننا نطالب الأمم المتحدة بأن تبذل ضغطاً إيجابياً على بريطانيا لاكراهها على تنفيذ قرار الجمعية العامة الصادر فى ديسمبر سنة ١٩٦٣ وبصفة خاصة لتعلق ذلك الأمر بمنع الاخلال بالسلم والأمن الدولى .

(١) دعت بريطانيا إلى عقد مؤتمر دستورى لبحث مشكلة عدن والمحميات ، انعقد فى لندن فى يونيو سنة ١٩٦٢ ولقد قاطعت الحركات الشعبية الحرة هذا المؤتمر .

مؤتمر أديس أبابا
ومنظمة الوحـــــدة الأفريقية

بقلم : الدكتور بطرس بطرس غالى

أستاذ ورئيس قسم العلوم السياسية بكلية الاقتصاد
والعلوم السياسية بجامعة القاهرة

نتعرض فى هذا البحث[1] للمؤتمر الذى انبثقت عنه منظمة الوحدة الأفريقية ثم نتولى تحليل ميثاقها ، ونعرف أهم الهيئات العاملة فيها ، والنشاط التى زاولته تلك الهيئات فى الفترة الوجيزة التى مرت منذ قيام المنظمة حتى اليوم .

مؤتمر أديس أبابا :

تعتبر منظمة الوحدة الأفريقية وليدة مؤتمر أديس أبابا الذى انعقد فى عاصمة أثيوبيا فى شهر مايو سنة ١٩٦٣ .

وقد تم هذا المؤتمر على مرحلتين : المرحلة الأولى مؤتمر وزراء خارجية الدول الأفريقية ، والمرحلة الثانية مؤتمر رؤساء الدول الأفريقية .

واشترك فى المؤتمر الأول وزراء خارجية ثلاثين دولة أفريقية[2] ويلاحظ على هذا المؤتمر :

أولا : لم يشترك فيه وزير خارجية المغرب العربى احتجاجاً على اشتراك وزير خارجية موريتانيا لما بين الدولتين من خلاف .

---

(١) كان هذا البحث موضوع محاضرة ألقيت فى الجمعية المصرية للقانون الدولى بتاريخ ٢٧ مارس ١٩٦٤ .

(٢) هذه الدول هى : الجزائر ، بوراندى ، الكمرون ، الكونغو (برازافيل) ، الكونغو (ليوبولدفيل) ، ساحل العاج ، داهومى ، أثيوبيا ، جابون ، غانا ، غينيا ، فولتا العليا ، ليبريا ، ليبيا ، مدغشقر ، مالى ، موريتانيا ، النيجر ، نيجيريا ، الجمهورية العربية المتحدة ، جمهورية أفريقيا الوسطى ، رواندا ، السنغال ، سيراليون ، الصومال ، تنجانيقا ، تشاد ، تونس ، أوغندة ، السودان .

ثانياً : عدم اشتراك وزير خارجية توجو لحدوث انقلاب فى حكومة بلاده ، وعدم اعتراف الدول الأفريقية بالحكومة الجديدة .

ثالثاً : اشتراك ممثلين لأربعة وعشرين حزباً ومنظمة تحريرية لبلاد أفريقية لم تظفر باستقلالها بعد . وقد اشترك هؤلاء الممثلون بصفة مراقبين فى المؤتمر .

وقد اختار المؤتمر فى أول جلساته وزير خارجية أثيوبيا رئيساً له ، كما وافق على جدول الأعمال التالى[1] :

١ — إنشاء منظمة أفريقية جديدة .

٢ — التعاون بين الدول الأفريقية .

٣ — التخلص من الاستعمار .

٤ — التميز العنصرى .

٥ — أثر التكتلات الاقتصادية الأفريقية على النمو الاقتصادى فى أفريقيا .

٦ — نزع السلاح .

٧ — إنشاء لجنة توفيق دائمة .

٨ — أفريقيا والأمم المتحدة .

وقد كون المؤتمر لجنتين : أسند إلى الأولى دراسة النقط ١ ، ٢ ، ٣ ، ٥ من جدول الأعمال ، وانتخب رئيساً لها السيد دودو تيام وزير خارجية السنغال . أما اللجنة الثانية فقد أسند إليها دراسة باقى نقط جدول الأعمال ، وانتخب رئيساً لها السيد دياللو تللى مندوب غينيا الدائم فى الأمم المتحدة .

---

(١) انظر :

Ordre du jour de la Conférence des Ministres des Affaires Etrangères. Actes de la Conférence au Sommet des pays indépendants d'Afrique, Vol. I pp. 24–25 (Confidentiel Agenda) 12–17 Mai 1963.

وقد اجتمعت كل من اللجنتين عدة مرات ، وكونت كل منها لجاناً فرعية لها لدراسة الموضوعات المتفرعة من جدول الأعمال ، واختتمت أعمالها فى ٢٢ مايو ١٩٦٣ ، وتقدمت بعدة مقترحات[1] ، ولكنها لم تصل إلى رأى فى الشكل النهائى للمنظمة الأفريقية المزمع إنشاؤها ، ولما كان من تعارض فى الآراء ، فكان هناك رأى يقول باقامة الوحدة الأفريقية على أساس فيدرالى حيث تتنازل الدول الأعضاء عن سيادتها الخارجية لحكومة مركزية واحدة تشرف على أمور القارة ، بينما كان هناك رأى آخر يقول باقامة الوحدة الأفريقية على شكل منظمة أو مؤتمر دائم تتعاون فى ظله الدول الأعضاء ، على أن تحتفظ كل دولة بسيادتها الخارجية ،وعلى الرغم من ميل الأغلبية إلى الرأى الثانى فقد انتهى المؤتمر دون الوصول إلى رأى نهائى تاركاً كلمة الفصل لمؤتمر رؤساء الدول الذى انعقد فيما بعد .

مؤتمر رؤساء الدول والحكومات الأفريقية :

انعقد هذا المؤتمر فيما بين ٢٤ ، ٢٨ مايو سنة ١٩٦٣ ، وحضره رؤساء الدول والحكومات التى كانت مشتركة فى مؤتمر وزراء الخارجية ، واستطاع هذا المؤتمر أن يتغلب على الصعوبات التى اعترضت المؤتمر الأول ، وأسفر اجتماعه عن ميثاق منظمة الوحدة الأفريقية .

ولا بد لنا هنا أن نلم بشىء عن التيارات السياسية والفكرية التى دارت فى هذا المؤتمر قبل أن نقوم بتحليل ميثاق الوحدة الأفريقية ، لأن تلك التيارات مع أنها لم تسجل فى متن الميثاق الأفريقى فانها تساعدنا على فهم روح

---

(١) انظر :

Rapport sur les Travaux du Comité I.

Sommet Cias (Plen) 3–22 Mai 1963. Vol. I pp. 38–45.

Rapport sur les Travaux du Comité II, op. cit., Vol. I, pp. 61–74.

المنظمة الحقيقية . ونختار من هذه التيارات والأفكار ما تضمنته بعض المناقشات ومنها :

أولا : المناقشة التى دارت حول الأساس الفلسفى للوحدة الأفريقية .
ثانياً : المناقشة التى دارت لمواجهة التخلف الأفريقى .
ثالثاً : المناقشة التى دارت حول شكل المنظمة الأفريقية الجديدة .

فالمناقشة الأولى[1]، وهى التى دارت حول الأساس الفلسفى للوحدة الأفريقية، كانت مثار جدل بين رؤساء الدول فى المؤتمر، فقد صرح رئيس وزراء نيجيريا بأنه لا يؤمن بالشخصية الأفريقية ولكنه يؤمن بالشخصية الإنسانية . ولكن هذا الرأى لم يكن له صدى ، ولم يستجب له أحد من الزعماء الذين أعلنوا إيمانهم بالشخصية الأفريقية ، وضرورة البحث عنها . فامبراطور أثيوبيـــا يرى أن هذه الشخصية كامنة فى تاريخ القارة قبل الاستعمار ، وينضم إليه فى هذا الرأى ملك بوراندى . أما الرئيس ليوبولد سانغور فعرفها بالأفريقية ، وقال إنها مجموعة القيم الأفريقية للمدنية،وقد تبلورت منذ ما قبل ظهور المسيحية والإسلام فى القارة ، كما يرى أن إدراك هذه القيم هو الخطوة الأولى نحو إقامة الوحدة الأفريقية ، وإذا انعدم هذا الادراك انعدمت معه الإرادة لتحقيق هذه الوحدة . أما سيكوتورى فيرى أنه لا يمكن لأى دولة بمفردها أن تمثل أفريقيا تمثيلا حقيقياً، ولا أن تسترد لشعوبها مكانتهم . ويرى أن المدنية الأفريقية ، والثقافة الأفريقية ، والإنسانية الأفريقية ، وبالاجمال نصيب أفريقيا فى حياة الإنسانية . . كل ذلك يتطلب من الشعوب الأفريقية أن تتضامن ، وتعمل يداً واحدة فى سبيل بناء الرفاهية العالمية .

---

(١) انظر فى هذا الصدد :
Sommet Cias (Gen / inf / 35) page 4–3, page 1–16, page 1–5, page 1–9, page 2–12, page 5–9, page 2–12, page 5–21, page 12–11, page 4–5, page 3–26, page 6–35, page 4–3, page 9–29, page 3.

وهذه الشخصية الأفريقية سواء أطلق عليها اسم الأفريقية كما يقول ليوبولد سانجور ، أو اسم الإنسانية الأفريقية كما يقول سيكوتورى، أو اسم التراث الثقافى الأفريقى كما يقول هوفويب بونييه ، أو القومية الأفريقية كما يرى البعض الآخر . . هذه الشخصية على كل حال ركن من أركان منظمة الوحدة الأفريقية .

والمناقشة الثانية كانت لمواجهة التخلف الأفريقى[1] وكان مما قاله السيد ليوبولد سانغور رئيس جمهورية السنغال فى هذا الصدد : إن هناك عنصراً مشتركاً بيننا وهو وضعنا باعتبارنا دولا متخلفة، وقد أكد ذلك وبنفس الصراحة كل من رئيس جمهورية الكمرون، وملك يوراندى، ورئيس جمهورية النيجر وغيرهم ، ولكن ما العلاج الذى اقترح لمقاومة هذا التخلف ؟ إذا كان هناك اجماع على أن الخطوة الأولى نحو التخلص من التخلف تتمثل فى التعاون الاقتصادى بين الدول الأفريقية ، فان هذا الاجماع لم ينعقد بشأن الخطوة الثانية وهى المساعدات الأجنبية .

وكان الرأى الغالب يؤيد بقاء المساعدات الأجنبية للدول الأفريقية بشروط وضمانات مختلفة ، وفى هذا قال رئيس الجمهورية العربية المتحدة بصراحة ووضوح إن هذه المساعدات ضريبة مفروضة على الدول الغنية للدول النامية . وكان مما اقترح أن تحاط به المساعدات الأجنبية :

١ — ألا تكون مرتبطة بشروط سياسية أو عسكرية قد يترتب عليها خروج الدول الأفريقية على مبدأ عدم الانحياز .

٢ — يستحسن أن تقدم هذه المعونات عن طريق منظمات لمجموعات من الدول الأفريقية لا لكل دولة على حدة .

---

(١) انظر فى هذا الصدد :

Summit / Cias / Gen / inf / 9, page 2–10, page 7–16, page 1–24 page 2–19, page 2–16, page 3–26, page 3–16, page 3–8, page 4 and page 6–36, page 2–10, page 7–10, page 7.

٣ ـ يستحسن أن تقدم هذه المعونات عن طريق منظمة الأمم المتحدة أو إحدى الهيئات التابعة لها .

إلى جانب هذا الرأى وجد رأى آخر يعارض مبدأ المساعدات الأجنبية ما دامت أفريقيا لم تتحد فى شكل دولة واحدة ، لأن المساعدة التى تتم فى ظل التجزئة معناها استتباب الاستعمار الجديد ، وكان هذا رأى الدكتور نكروما ولكن لم يؤخذ به .

أما المناقشة الثالثة[١] فكانت خاصة بشكل المنظمة الأفريقية الجديدة، وقد انقسمت الآراء حول ذلك كما انقسمت من قبل فى مؤتمر وزراء الخارجية وكانت فى مجملها تدور حول ثلاثة آراء :

- رأى الدكتور نكروما الذى كان يطالب باقامة حكومة اتحادية تفقد فى ظلها الدول الأفريقية سيادتها الخارجية ، ويرى أن أى شكل أقل من ذلك يعنى أننا أخفقنا ، ولكن الأغلبية الكبرى لم توافق على هذا الرأى .
- ورأى الرئيس جمال عبد الناصر الذى طالب باقامة منظمة أيا كان شكلها على ألا ينفض اجتماعنا دون تحقيق عمل ايجابى .
- أما الرأى الثالث فقد نادى باقامة منظمة دولية إقليمية على مبدأ التعاون الحر ، وفى ظلها تحتفظ كل دولة عضو بسيادتها ، وهذا هو الرأى الذى تمت له السيادة ، ونجمت عنه منظمة الوحدة الأفريقية التى سنتناول ميثاقها الآن بالدرس والتحليل .

---

(١) انظر فى هذا الصدد :

Summit / Cias / Gen / inf / 36 page 6–10 II, 15 page 2 and 3–11, page 4–14, page 12–9, page3–4–8, page 6–14, page 12–3, page 5–11, page 4–26, page 7.

ميثاق منظمة الوحدة الأفريقية :

يتكون ميثاق منظمة الوحدة الأفريقية من ديباجة واثنتين وثلاثين مادة :

وتتضمن الديباجة[1] مبادىء تقليدية ذكرت أكثر من مرة فى مواثيق المنظمات الدولية مثل مبدأ حق تقرير المصير ، ومبدأ المساواة والعدالة والكرامة ، ومبدأ احترام الاستقلال السياسى والوحدة الإقليمية للدول الأعضاء ، والاعتراف بمبادىء وأهداف الأمم المتحدة ، ومبادىء حقوق الإنسان .

وبعدئذ يذكر الميثاق أهدافه ومنها : تشجيع وحدة الدول الأفريقية وتضامنها ، ثم تنسيق وتعزيز التعاون بينها ، والدفاع عن سيادة دول المنظمة ،

---

(١) نحن رؤساء الدول والحكومات الأفريقية المجتمعين فى مدينة أديس أبابا بأثيوبيا .
نعرب عن اقتناعنا بحق جميع الشعوب الثابت فى أن تقرر مصيرها بنفسها .
وندرك هذه الحقيقة وهى أن الحرية والمساواة والعدالة والكرامة أهداف جوهرية لتحقيق الأمانى المشروعة للشعوب الأفريقية .
وندرك المسئولية الواقعة على عاتقنا من أجل استغلال الموارد الطبيعية والبشرية لقارتنا فى سبيل تقدم شعوبنا فى مجالات العمل الإنسانى .
ويلهمنا التصميم المشترك على تشجيع التفاهم بين شعوبنا والتعاون بين دولنا استجابة لأمانى شعوبنا من أجل تقوية أواصر اخوتنا وإيجاد التضامن فى وحدة أكبر تسمو على جميع الخلافات العنصرية والقومية .
ونحن مقتنعون بأنه لترجمة هذا التصميم إلى قوة ديناميكية من أجل قضية التقدم الإنسانى يجب إيجاد الظروف الملائمة للابقاء على الأمن والسلام .
ونحن يحدونا التصميم على ضمان وتدعيم استقلال دولنا الذى حصلنا عليه بمشقة وصعوبة وكذلك على سيادتها وسلامة أراضيها وعلى محاربة الاستعمار الجديد بجميع صوره .
ونحن نكرس أنفسنا لتحقيق التقدم العام فى أفريقيا .
ونحن مقتنعون بأن ميثاق الأمم المتحدة واعلان حقوق الإنسان وهما اللذان نؤكد تمسك مبادئنا بهما يوفران أساساً متيناً للتعاون الإيجابى والسلمى بين الدول .
وإننا نرغب فى توحيد جميع دول أفريقيا ومالاجاشى من أجل ضمان رفاهية ومستقبل شعوبنا ونعرب عن عزمنا على تعزيز الروابط بين دولنا بانشاء وتقوية منظماتنا المشتركة .
وبناء على ذلك نعلن اتفاقنا على إنشاء منظمة الوحدة الأفريقية .

ومن أجل تحقيق هذه الأغراض تقوم الدول الأعضاء بتنسيق سياساتها فى الميادين الدبلوماسية والاقتصادية ، والنقل والمواصلات والتعليم والثقافة ، والصحةوالطب والتغذية ، والتعاون العلمى والفنى ،وأخيراً التعاون فى ميادين الأمن والدفاع .

وإذا كانت الأهداف المذكورة فى المادة الثانية من الميثاق من الوضوح بحيث لا تحتاج إلى شرح أو تحليل فان المبادىء التى ستعمل الدول الأفريقية على أساسها لتحقيق تلك الأهداف هى التى تحتاج إلى الشرح والتحليل .

وقد قسمنا المبادىء التى ذكرت فى المادة الثالثة من الميثاق إلى مجموعتين رغم الصلة الوثيقة بينها ، ورغم أن الميثاق لم يذكر هذا التقسيم .

أما المجموعة الأولى من هذه المبادىء فهى التى تحكم العلاقات بين الدول الأفريقية وبعضها ، وأما المجموعة الثانية فهى التى يجب أن تتبعها الدول الأفريقية فى علاقاتها مع الدول غير الأفريقية .

المبادىء التى تحكم العلاقات بين الدول الأفريقية :

هذه المبادىء كما وردت فى المادة الثالثة من ميثاق أديس أبابا هى :

أولا : المساواة فى السيادة بين جميع الدول الأفريقية .

ثانياً : عدم التدخل فى الشئون الداخلية للدول .

ثالثاً : احترام سيادة كل دولة وسلامة أراضيها .

رابعاً : فض المنازعات بالطرق السلمية .

أما المبدأ الأول وهو مبدأ المساواة فمعناه أن جميع الدول الأفريقيـــة مهما اختلفت فى القوة ، أو الاتساع الإقليمى ، أو تعدد السكان ، فان لكل منها صوت واحد داخل المنظمة الأفريقية ،وتشترك علىقدم المساواة فى جميع الهيئات العاملة،وبذلك لا تكون فيها مقاعد دائمة وأخرى غير دائمة ، ولا أصوات ممتازة وأخرى غير ممتازة كما هو الوضع فى الأمم المتحدة .

ومبدأ المساواة لا يطبق من الناحية القانونية أو التنظيمية فحسب ، بل يطبق أيضاً من الناحية السياسية والواقعية ، فبعض المنظمات تنادى بمبدأ المساواة التامة ، وتعمل به من الناحية القانونية ، ولكن من الناحية الواقعية نرى أن المنظمة خاضعة لزعامة دولة واحدة كما هو الحال فى حلف الأطلنطى الذى يخضع للزعامة الأمريكية .

وفى بعض خطب رؤساء الدول الأفريقية التى ألقيت فى مؤتمر أديس أبابا استنكار صريح لفكرة الزعامة لدولة واحدة فى المنظمة الأفريقية[١]. ومن هذا يبدو الفرق واضحاً بين التنظيم الأفريقى وبعض التنظيمات الأخرى التى تعترف بزعامة دولة بطريقة صريحة أو ضمنية .

أما المبدأ الثانى ،وهو مبدأ عدم التدخل فى الشئون الداخلية للدول الأعضاء، فقد ورد فى الفقرة الثانية من المادة الثالثة ، وقد أدمج فيه المبدأ الذى تضمنته الفقرة الخامسة من المادة الثالثة ومضمونه « الاستنكار التام لأعمال الاغتيال السياسى بجميع صوره ، وكذلك أنواع النشاط الهدام من جانب أى دولة سواء أكانت مجاورة أم بعيدة .

ومبدأ عدم التدخل كان موضع مناقشات كثيرة فى مؤتمر أديس أبابا، وحبذا لو كان أضيف إليه مبدأ عدم الاعتراف بالحكومات الجديدة التى تصل إلى الحكم عن طريق انقلاب ممول من الخارج أو نتيجة لحركة هدامة . وقد حاولت أمريكا اللاتينية تطبيق فكرة مماثلة فى نظرية توبار التى تقضى بعدم الاعتراف بأى حكومة جديدة تصل إلى الحكم عن طريق انقلاب ، ولكنها لم تحقق ذلك . والاضطرابات العسكرية التى وقعت فى كل من تنجانيقا ، وأوغندة ، وكينيا فى أوائل هذا العام تشير إلى حاجة أفريقيا إلى نظرية توبار[٢] الأفريقية لضمان الاستقرار فى القارة .

---

(١) انظر :
Summit / Cias / Gen / inf / 8 / page 6 and page 24.

(٢) Doctrine de Tobar

أما المبدأ الثالث ، فهو خاص باحترام سيادة كل دولة ووحدتها الإقليمية ، وهذاالمبدأ مرتبط بمشكلة خطيرة هى مشكلة الحدود السياسية التى تفصل بين شتى الدول الأفريقية ، فتلك الحدود قد وضعت خلال عهد الاستعمار دون النظر إلى المقتضيات الاقتصادية والجغرافية للدول الأفريقية . فهل تبقى تلك الحدود كما وضعت أيام الاستعمار ، أم يجب إعادة النظر فيها فى ظل الاستقلال ؟ .

من الواضح أن التيار الذى ساد مؤتمر أديس أبابا كان يرمى إلى الابقاء على الحدود كما هى بدون تغيير . وقد عبر عن ذلك أكثر من رئيس ممن حضروا مؤتمر أديس أبابا ، فيقول موديبوكيتا « يجب أن نتنازل عن أى مطلب إقليمى إذا أردنا ألا ندخل فى أفريقيا ما يمكن وصفه بأنه استعمار أسود » وأضاف إلى ذلك السيد سيرانانا رئيس جمهورية مدغشقر قوله « لقد أصبح غير ممكن أن نلجأ إلى معايير جنسية أو دينية لتغيير الحدود ، لأننا ان فعلنا ذلك فهناك بعض دول أفريقية تزول من الخريطة » وأكد وزير خارجية الجزائر هذا المبدأ أمام اجتماع مجلس الوزراء غير العادى للدول الأفريقية فيما بين ١٥ و ١٨ نوفمبر سنة ١٩٦٣ بمناسبة ما كان من خلاف على الحدود بين الجزائر والمملكة المغربية العربية . إلا أن مبدأ بقاء الحدود السياسية الأفريقية كما هى لم ينص عليه صراحة فى الميثاق كما هو الحال فى مبدأ Utis possidetis المتبع فى أمريكا اللاتينية ، ومعلوم أنه يقضى بأن الحدود التى تفصل بين دول أمريكا اللاتينية تطابق التقسيمات الإدارية التى وضعتها الامبراطورية الاستعمارية الأسبانية القديمة ، ومعنى ذلك الاعتراف بالتراث الاستعمارى فى رسم الحدود السياسية لدول أمريكا اللاتينية[1] .

---

(١) من الجدير أن نلاحظ أن رئيس جمهورية الصومال لم يوافق على هذا المبدأ فى مؤتمر أديس أبابا ، انظر فى هذا الصدد :

Summit / Cias / Gen / inf / 25 page 5.

أما المبدأ الرابع، فهو الخاص بفض المنازعات بالطرق السلمية ، وقد ذكرت الفقرة الرابعة من المادة الثالثة أربع وسائل لفض المنازعات : وهى المفاوضات، والوساطة ، والتراضى ، والتحكيم. كما أشارت المادة ١٩ من الميثاق إلى ضرورة إنشاء لجنة للوساطة والتسوية والتحكيم ، وأن يوضع لها بروتوكول خاص يعتبر جزءاً لا يتجزأ من الميثاق . ومن المنتظر أن يوافق مجلس رؤساء الدول الأفريقية فى دورته العادية القادمة فى مايو ١٩٦٥ على إنشاء هذه اللجنة .

ويلاحظ أن ميثاق أديس أبابا لم يذكر الالتجاء إلى محكمة العدل الدولية بين أساليب فض المنازعات بالطرق السلمية ، على الرغم من أن الدول الأفريقية تشترك فى هذه المحكمة بصفتها مشتركة فى الأمم المتحدة، ولسنا نقول إن ذلك سببه عدم الثقة فى هذه المحكمة ، ولا عدم الثقة فيما تصدره من أحكام ، ولكننا نرجع ذلك غالباً إلى طول الإجراءات ، وكثرة النفقات أمام هذه المحكمة .

تلك هى المبادىء التى تحكم العلاقات بين الدول الأفريقية وبعضها ،أما المبادىء التى تحكم علاقات الدول الأفريقية بغيرها من الدول فهى :

١ — التعاون التام فى إطار الأمم المتحدة .

٢ — تكتل جميع الجهود من أجل تحقيق الاستقلال الكامل لجميع الأراضى الأفريقية .

٣ — محاربة الاستعمار الجديد فى جميع صوره .

٤ — تأكيد سياسة عدم الانحياز فى مواجهة جميع التكتلات .

أما المبدأ الأول ، فقد ذكر صراحة فى أكثر من مادة من مواد ميثاق أديس أبابا[١]، ويتضح من المناقشات التى دارت فى المؤتمر أن خير إطار للعلاقات بين الدول الأفريقية والدول التى كانت تستعمرها هو الأمم المتحدة .

---

(١) انظر المادة ٢٥ فقرة هـ والمادة ٢٦ من ميثاق أديس أبابا .

ومما يجعل ذلك ميسوراً أن جميع الدول الأفريقية أعضـــاء فى الأمم المتحدة .

أما المبدأ الثانى ، فهو مكافحة الاستعمار ، ولو أدى الأمر إلى استعمال القوة . وقد وضع مؤتمر أديس أبابا برنامجاً شاملا لمحاربة الاستعمار سواء فى الميدان الداخلى ، أو الميدان الدولى ، ومن ذلك مقاطعة الدول الاستعمارية وخاصة البرتغال واتحاد جنوبى أفريقيا ، والعمل على طردها من المنظمات الدولية وإعادة تنظيم الحركات التحررية فى مختلف أنحاء أفريقيا ، ومدها بالمال والسلاح .[1]

أما المبدأ الثالث ، فهو خاص بمحاربة الاستعمار الجديد ، وقد ورد ذكره فى ديباجة الميثاق ، ولم يذكر فى صلبه — وإذا كان مبدأ محاربة الاستعمار واضحاً لا يحتاج إلى شرح أو دراسة لأن مفهوم الاستعمار واضح ملموس ، فان محاربة الاستعمار الجديد هى التى تحتاج إلى شرح وإيضاح لأن الاستعمار الجديد ليس له مفهوم واضح محدود . فما المقصود بالاستعمار الجديد ؟ وما الفرق بينه وبين الاستعمار القديم ؟ هناك ثلاثة تفسيرات للاستعمار الجديد :

أولها : التفسير الماركسى الذى يرى أن هناك تعارضاً جذرياً بين الدول الاستعمارية والدول الواقعة تحت الاستعمار ، وهذا التعارض تبقى آثاره حتى بعد أن تحصل المستعمرات على استقلالها بحيث تصبح العلاقة بين الدولة المستقلة حديثاً والدولة التى كانت تستعمرها علاقة لا تخلو من بعض صور الاستعمار الجديد .

والثانى : التفسير الاقتصادى الذى يرى أن العلاقات القائمة بين الدول الصناعية المتقدمة ، والدول المتخلفة المنتجة للمواد الأولية لا يمكن أن تكون

---

(١) انظر البرنامج الشامل لمكافحة الاستعمار فى محاضر مؤتمر أديس أبابا الجزء الأول (باللغة الفرنسية) ص ٧٠ إلى ٧٢ .

متكافئة، لأن الخسارة دائماً تكون على الدولة المتخلفة ، والربح للدولة الغنية . وقد أشار الرئيس جمال عبد الناصر إلى هذه النظرية فى قوله بمؤتمر أديس أبابا« هناك الإصرار على تحويل القارة إلى مجرد مخزن للمواد الخام بأسعار لا تكفى لسد جوع أهلها بينما الفائدة كلها تذهب إلى البلاد المستوردة التى تحاول أن تجعل من تقدمها الصناعى والعلمى شبه استعمار من نوع جديد .

والثالث : هو النظرية التى تولى شرحها الدكتور كوامى نكروما، إذ بين أن هناك لوناً من ألوان الاستعمار الجديد يتمثل فى التجزئة ، فالاستعمار القديم قبل أن ينسحب من منطقة ما يعمل على تجزئتها إلى دويلات صغيرة لا تستطيع كل منها أن تقوم وحدها فتضطر إلى مد يدها إليه ، فتستمر العلاقة الاستعمارية قائمة تحت ستار جديد ، هو الذى نسميه الاستعمار الجديد .

والرابع : الاستعمار الجديد هو الذى قدمه أيضاً الرئيس جمال عبد الناصر فى إحدى دورات مؤتمر الدار البيضاء ، وبموجب هذا التفسير تعتبر الصهيونية الدولية صورة من صور الاستعمار الجديد . فالاستعمار القـديم قد أنشأ الدولة الصهيونية لتكون ركيزة له فى الشرق العربى ووسيطاً له فى القارة الأفريقية .

تلك هى التفسيرات التى عرف بها الاستعمار الجديد ، ولكن مؤتمر أديس أبابا لم يأخذ بأى تعريف منها ، واكتفى بأن يذكر فى ديباجته عبارة « محاربة الاستعمار الجديد بجميع صوره » . ونستخلص من ذلك :

أولا : أن الاستعمار الجديد خطر قائم ملموس يهدد القارة الأفريقية فى وحدتها وفى نموها .

ثانياً : أن له عدة صور ، لا صورة واحدة .

ثالثاً : لم يحدد الميثاق أساليب مكافحة هذا الاستعمار ، بخلاف ما اتبع بالنسبة للاستعمار القديم .

أما المبدأ الرابع ، فهو خاص باتباع سياسة عدم الانحياز ، وقد ذكر صراحة فى الفقرة السابعة والأخيرة من المادة الثالثة التى تقول : « تأكيد سياسة عدم الانحياز فى مواجهة جميع التكتلات ويقصد بذلك عدم الارتباط عسكرياً أو سياسياً مع إحدى الكتلتين المتنازعتين ، وعدم اتباع سياسة خارجية قد تؤدى إلى الانحياز .

ولكن هذا المبدأ لا يعنى أن الدول الأفريقية لا حق لها فى استعمال القوة فى علاقاتها الخارجية وفقاً لحق الدفاع الشرعى الفردى أو الجماعى ، كما أنه لا يعنى أن الدول الأفريقية لا تستطيع أن يتحالف بعضها مع البعض الآخر .

وقد يقال : وما الفرق بين الأحلاف العسكرية الأفريقية والأحلاف العسكرية التى تعقد مع دول أوربية ؟ وجوابنا هو أن الأحلاف العسكرية الأفريقية لا تعنى الخروج على مبدأ عدم الانحياز ما دامت كل الدول الأفريقية تتبع هذه السياسة ، أما الأحلاف التى يكون أحد أطرافها تابعاً للمعسكر الشيوعى أو المعسكر الغربى فانها ستؤدى إلى ادخال الحرب الباردة فى القارة وتكون سبباً فى تمزيق مبدأ عدم الانحياز .

وعلينا أن ندرس الآن النتائج التطبيقية لهذا المبدأ . ما موقف الدولة الأفريقية التى ارتبطت قبل إبرام ميثاق أديس أبابا مع دولة أوربية منحازة ؟ هل يتطلب منها إلغاء معاهدتها ؟ .

كون مبدأ عدم الانحياز ورد ضمن المبادىءالعامة يجعل الدولة الأفريقية حرة فى اختيار الوقت المناسب لإلغاء ما تكون قد ارتبطت به من معاهدات ، ولكن يجب أن تعمل على التخلص من تلك الاتفاقات التى جعلتها تنحاز ما دامت قد وقعت على ميثاق أديس أبابا الذى ينص على مبدأ عدم الانحياز .

العضوية فى منظمة الوحدة الأفريقية :

الأحكام الخاصة بالعضوية فى هذه المنظمة منصوص عليها فى المادة ٢٨ من ميثاق أديس أبابا ، ووفقاً لأحكام هذه المادة تستطيع أى دولة مستقلة ذات

سيادة اخطار السكرتير العام الإدارى للمنظمة برغبتها فى الانضمام إليها ،ويتولى السكرتير العام عرض الأمر على الدول الأعضاء ، ويتقرر قبول العضوية بالأغلبية العادية . ومن هذا يتبين أن إجراءات الانضمام ميسرة للغاية ، لا تتقيد بأغلبية خاصة ، وليس هناك حق اعتراض ممنوح لبعض الدول ، وكل ما هو مطلوب أن تكون الدولة أفريقية ، وأن تكون مستقلة .

وقد حدد مفهوم « الأفريقية » تحديداً جغرافياً جعل المقصود هو البلاد الواقعة داخل القارة الأفريقية . وقد أضيف إلى القارة الجزر المحيطة بها ويقدر عددها بأربع وعشرين جزيرة أو مجموعة جزر ، وهذه الجزر ذات أهمية كبرى للقارة إذ كانت من قبل قواعد انطلق منها الاستعمار إلى صميم القارة .

والأفريقية إلى جانب معناها الجغرافى تتضمن معنى سياسياً وايديولوجيا ، وهو الإيمان بحق تقرير المصير ، وبعدم التمييز العنصرى . فدولة مثل اتحاد جنوب أفريقيا لا تستطيع أن تنضم إلى منظمة الوحدة الأفريقية لأن حكومتها تأخذ بسياسة التمييز العنصرى .

وكما أن للدول الأفريقية حق الانضمام إلى المنظمة فلها كذلك حق الانسحاب منها وفقاً لأحكام المادة ٣٢ من الميثاق إذ تقول « لكل دولة أفريقية الحق فى أن تنسحب ، ولكن عليها أن تقدم اخطاراً مكتوباً إلى الأمين العام الإدارى للمنظمة ، ولا يسرى الانسحاب إلا بعد مرور سنة من تاريخ الاخطار .

الهيئات العاملة فى المنظمة :

تنص المادة السابعة من ميثاق الوحدة الأفريقية على أن هذه المنظمة تحقق أهدافها عن طريق الهيئات العاملة التالية :

أولا : مجلس رؤساء الدول والحكومات .

ثانياً : مجلس الوزراء .

ثالثاً : السكرتارية العامة .

رابعاً : لجنة الوساطة والتوفيق والتحكيم .

أما مجلس رؤساء الدول والحكومات فهو الهيئة العليا ، ويجتمع مرة - على الأقل - كل عام فى دورة عادية ، ويجتمع فى دورة غير عادية بناء على طلب أى عضو إذا وافق على طلبه أغلبية الأعضاء[1] .

ووفقاً لأحكام المادة العاشرة يكون لكل دولة عضو صوت واحد ، وتصدر القرارات بأغلبية ثلثى الأعضاء . أما القرارات الخاصة بالإجراءات فتتم بالأغلبية البسيطة ، ومعرفة ما إذا كان القرار موضوعياً أو اجرائياً تتم بالأغلبية البسيطة كذلك[2] .

وليكون الاجتماع صحيحاً يشترط أن يكون الحاضرون يمثلون ثلثى الدول الأعضـــاء .

ولهذا المجلس اختصاصات واسعة يمكن تقسيمها إلى ثلاثة أنواع :

النوع الأول : الخطوط العريضة للسياسة العامة التى يسند تنفيذها إلى مجلس الوزراء .

النوع الثانى : الموافقة على قرارات مجلس الوزراء .

النوع الثالث : إنشاء الهيئات الفرعية التى يرى وجوب إنشائها . وقد نصت المادة العشرون على ذلك واشترطت وجوب إنشاء خمس لجان هى : اللجنة الاقتصادية والاجتماعية ،ولجنة شئون التعليم والثقافة ، ولجنة شئون الصحة والعلاج والتغذية ، ولجنة الدفاع ، ولجنة الشئون العلمية والفنية والأبحاث .

أما مجلس وزراء الخارجية فهو الهيئة العاملة الثانية فى المنظمة ، وقد نصت المادة الثانية على أنه يتكون من وزراء خارجية الدول الأعضاء ، أو أى وزراء تحددهم حكوماتهم . ويجتمع هذا المجلس مرتين كل عام فى

---

(١) انظر المادة ٨ من ميثاق أديس أبابا .

(٢) انظر المادة ١٠ من ميثاق أديس أبابا .

دورة عادية ، كما يجتمع فى دورة غير عادية بناء على طلب دولة عضو ، على أن يوافق على ذلك ثلثا الدول الأعضاء[1]. وقد اجتمع هذا المجلس فى دورته العادية الأولى فى أغسطس ١٩٦٣ بمدينة داكار ، أما الدورة العادية الثانية فقد بدأت فى لاجوس منذ يومين .

وقد انعقد هذا المجلس فى دورة غير عادية فى نوفمبر سنة ١٩٦٣ بمدينة أديس أبابا بناء على طلب دولة الجزائر للنظر فى الخلاف الذى وقع بين الجزائر والمغرب بشأن الحدود . كما انعقد فى دورة أخرى غير عادية فى فبراير سنة ١٩٦٤ بمدينة دار السلام بناء على طلب حكومة تنجانيقا على أثر الاضطرابات التى وقعت فى هذه المنطقة وبسببها استعانت حكومتها بالقوات البريطانية .

وفى كل هذه الاجتماعات أثبت المجلس قدرة وكفاية فى حل المشكلات الأفريقيـــة .

أما الهيئة العاملة الثالثة فهى الأمانة العامة ، ووفقاً لأحكام المادة السادسة عشرة يكون على رأسها أمين عام . وفى مؤتمر أديس أبابا أجل انتخاب الأمين العام إلى مؤتمر وزراء الخارجية ، وقد انعقد فى أغسطس سنة ١٩٦٣ ولم يتوصل إلى انتخاب الأمين العام ، ولكن تم الاتفاق على أن تكون أديس أبابا مقراً للأمانة العامة . وقد كلف السيد أوتو تيفلى الأثيوبى بأن يقوم مقام الأمين العام حتى يتم انتخاب الأمين العام .

أما الهيئة العاملة الرابعة فهى لجنة الوساطة والتوفيق والتحكيم ، وقد نصت المادة التاسعة عشرة من الميثاق على أن هذه اللجنة تشكل بموجب بروتوكول خاص يعتبر جزءاً من الميثاق الأفريقى .

وفى مؤتمر داكار الذى عقده وزراء الخارجية فى أغسطس سنة ١٩٦٣

---

(١) انظر المادة ١٢ من ميثاق أديس أبابا .

شكلت لجنة فنية لوضع هذا البروتوكول ، وسيعرض على مجلس رؤساء الدول والحكومات فى اجتماعه القادم .

* * *

وختاماً ـ نرى أن الحكم لهذه المنظمة الجديدة أو عليها أمر سابق لأوانه، إذ أنها لم تزل وليدة ولم تستكمل بعد كل مقوماتها ، ولم تقطع من عمرها مرحلة تصل إلى سنة ، ولكن البوادر ـ على كل حال ـ تشير إلى أنها حققت فى هذه الفترة القصيرة نجاحاً يبشر بمستقبل حسن لهذه القارة فى ميدان التعاون الأفريقى ، ولكن أمامها مشكلة ضخمة غير مشكلة التعاون ، وهى مشكلة التجزئة ، ففى هذه القارة ثلاث وثلاثون دولة ، وسيصل عددها عما قريب إلى أربعين دولة أو أكثر أى ضعف عدد دول القارة الأمريكية ، وتلك التجزئة لا تتمشى مع مقتضيات هذا النصف الأخير من القرن العشرين، فاذا كانت منظمة الوحدة الأفريقية وسيلة إلى تأكيد هذه التجزئة وتدعيمها فإنها لا تكون قد أدت رسالتها ،ولانجحت فى مهمتها ،ولكنها تكون قد أدت هذه الرسالة على خير وجه ، ونجحت خير نجاح إذا تحولت إلى منظمة تحت لوائها تزول تلك التجزئة وتتم الوحدة المنشودة .

القاهرة فى ٢٧ مارس ١٩٦٤

القيت هذه المحاضرة بدار الجمعية المصرية للقانون الدولى فى ٢٧ فبراير سنة ١٩٦٤ .

الحصانة القضائية للدولة

للدكتور فؤاد عبد المنعم رياض

ليست فكرة الحصانة القضائية للدولة بالفكرة الجديدة . غير أن هذا الموضوع قد اتسم فى الوقت الحالى بأهمية حيوية نظراً لاتساع نطاق نشاط الدولة فى العصر الحديث . فقد أصبحت الدولة تساهم بنصيب وافر فى الحياة الاقتصادية والتجارية للمجتمع الدولى بشكل لم يعهد له مثيل من قبل . ومما زاد هذه المشكلة تعقيداً أن الدولة لم تعد تكتفى بالتدخل بطريقة مباشرة فى المجال الاقتصادى والتجارى بل كثيراً ما تلجأ إلى طريقة غير مباشرة ، وذلك عن طريق تأميم المشروعات الخاصة المملوكة للأفراد وتحويلها من الملكية الفردية إلى الملكية الجماعية ، أو عن طريق إنشاء مشروعات عامة تملك الدولة كل أو معظم رأسمالها .

ولما كانت هذه المشروعات المؤممة أو العامة تخضع من ناحية لهيمنة الدولة التى تتملكها ، ومن ناحية أخرى تتمتع بشخصية قانونية مستقلة عن هذه الدولة ، فقد احتدم الخلاف حول مدى امكان شمول هذه المشروعات العامة بالحصانة القضائية التى قد تتمتع بها الدولة ذاتها .

هل يجب أن تمتد حصانة الدولة إلى هذه المشروعات باعتبارها مشروعات مملوكة للدولة وخاضعة لرقابتها ؟ أم هل يتعين اخراج هذه المشروعات من نطاق حصانة الدولة نظراً لما تتمتع به من شخصية قانونية مستقلة ؟

ولا يخفى ما لهذا الموضوع من أهمية خاصة بالنسبة للجمهورية العربية حيث تبوأت المشروعات العامة والمشروعات المؤممة مكان الصدارة فى الحياة الاقتصادية والدولية على حد سواء .

* ألقيت بدار الجمعية المصرية للقانون الدولى فى ١٢ مارس سنة ١٩٦٤ .

وسنعرض فى مبحث أول من هذه المحاضرة لما يجرى عليه العمل بالنسبة لحصانة الدولة الأجنبية ذاتها ، فاذا ما انتهينا من بحث هذا الموضوع عرضنا فى مبحث ثان لمدى امكان امتداد الحصانة القضائية للدولة إلى المشروعات العامة والمشروعات المؤممة المملوكة لها .

* * *

المبحث الأول

حصانة الدولة الأجنبية

كان المبدأ السائد فى مختلف الدول حتى أوائل القرن العشرين هو تمتع الدولة الأجنبية باعفاء مطلق من الخضوع لقضاء المحاكم الوطنية فى جميع المنازعات التى تكون طرف فيها إلا إذا قبلت الخضوع لذلك القضاء صراحة .

وقد قيل فى تبرير مبدأ الحصانة المطلقة للدولة بعدة أسانيد أهمها مبدأ سيادة الدولة . فسيادة الدولة واستقلالها يتنافيان مع امكان خضوعها بأية صورة من الصور لسلطان القضاء فى دولة أخرى . فمقاضاة دولة أمام محاكم دولة أخرى ينطوى على انتهاك لسيادتها ومساس باستقلالها .

وهناك اعتبارات ذات صبغة عملية دعت فى الواقع إلى القول بوجوب اعفاء الدولة من الخضوع لقضاء الدول الأخرى . فالحكم الذى قد تصدره المحاكم الوطنية ضد الدولة الأجنبية سيكون غير قابل للتنفيذ على أموال الدولة الأجنبية . ذلك أن تنفيذ الأحكام قد يستلزم الالتجاء إلى القوة الجبرية ، ولا يستساغ أن تستعمل هذه القوة ضد دولة أجنبية ، إذ قد يؤدى ذلك إلى تهديد السلم والأمن الدولى .

* * *

وقد أخذ مبدأ الحصانة المطلقة للدولة يتزعزع نتيجة لاتساع دور الدولة وقيامها بأعمال تخرج عن إطار نشاطها التقليدى . والواقع أنه ليس من الانصاف أن نسمح للدولة الأجنبية بالتعامل مع الأفراد والدخول معهم فى

معاملات تجارية مع حرمان هؤلاء الأفراد فى الوقت ذاته من الضمان الأساسى اللازم لحماية حقوقهم وهو حق الالتجاء إلى قضائهم الوطنى .

لذلك أخذت الكثير من الدول تحيد تدريجياً عن مبدأ الحصانة المطلقة للدولة وقررت قصر هذه الحصانة على بعض أنواع النشاط الذى تمارسه الدولة دون البعض الآخر . وكان من أوائل المنادين بمبدأ الحصانة المقيدة للدولة القضاء الإيطالى [1] والقضاء البلجيكى [2] والقضاء المصرى [3] .

غير أن القضاء فى هذه الدول اختلف حول المعيار الواجب الاتباع لتحديد أنواع النشاط الذى يتعين بالنسبة له اعفاء الدولة الأجنبية من الخضوع للقضاء الوطنى .

وقد كان أول معيار لجأ إليه الفقه والقضاء للحد من حصانة الدولة الأجنبية هو وجوب التفرقة بين شخصية الدولة كسلطة صاحبة سيادة وشخصيتها كفرد عادى [4] فاذا ظهرت الدولة الأجنبية فى المنازعة كسلطة صاحبة سيادة امتنع على القضاء الوطنى النظر فى المنازعة ووجب اعتبار الدولة الأجنبية فى مثل هذه الحالة متمتعة بالحصانة . أما إذا ظهرت الدولة الأجنبية فى المنازعة كشخص عادى فلا تتمتع بالاعفاء من القضاء الوطنى وتختص

---

(١) وقد صدر أول حكم بهذا المعنى من محكمة النقض الإيطالية سنة ١٨٨٢ فى القضية الشهيرة Morellet c. Governo Danese. (Giurisprudenza Italiana 1883, I, p. 130).

(٢) انظر بصفة خاصة حكم محكمة النقض البلجيكية الصادر سنة ١٩٠٣ فى قضية Chemins de Fer Liège–Luxembourg c. Etat des Pays–Bas (Clunet 1904, p. 417).

(٣) انظر حكم محكمة الاستئناف المختلطة الصادر سنة ١٩٠١ فى قضية Gelderland منشور فى Bulletin de Législation et de Jurisprudence Egyptiennes, T. XIII (1900–1901), p. 334.

(٤) ومن الأحكام الهامة المقررة لهذه التفرقة الحكم الصادر من محكمة برلين فى ٢٥ فبراير ١٩٥٥ منشور فى International Law Reports, 1955, p. 230. والحكم الصادر من محكمة Kiel فى ١٩ مارس سنة ١٩٥٣ منشور فى Juristenzeitung 1954, p. 118. والحكم الصادر من محكمة النقض الإيطالية سنة ١٩٥٦ منشور فى Rivista di Diritto Internazionale, 1956, p. 190.

المحاكم الوطنية بالنظر فى الدعوى المرفوعة عليها كما لو كانت دعوى مرفوعة على فرد عادى .

وقد برز هذا المعيار بصفة خاصة فى القضاء المصرى[٥]. ومن الأحكام الشهيرة فى هذا الصدد حكم أصدرته محكمة الاستئناف المختلطة فى ١٧ يونيو سنة ١٩٤٢ فى دعوى رفعت ضد حكومة الانتداب بفلسطين[٦]. وتتلخص وقائع هذه القضية فى أن أحد المسافرين أصيب بأضرار نتيجة لوقوع بعض الأمتعة على رأسه أثناء سفره بخطوط سكة حديد فلسطين التى تديرها هذه الحكومة . وقد طالب المدعى بالتعويض من حكومة الانتداب باعتبارها مسئولة عن أعمال مستخدميها فى ربط الأمتعة مما أدى إلى وقوع الحادث . وقد دفعت حكومة فلسطين بالحصانة ، غير أن القضاء المختلط رفض هذا الدفع تأسيساً على أن الحكومة عند إدارتها للسكك الحديدية لم تتصرف باعتبارها سلطة صاحبة سيادة وأنها ظهرت بمظهر الفرد العادى الذى يتعين اخضاعه لولاية القضاء .

وقد انتقد هذا المعيار نظراً لقيامه على فكرة غير سليمة وهى فكرة ازدواج شخصية الدولة : فمن غير المقبول أن يكون للدولة شخصيتين : شخصية باعتبارها سلطة عامة وأخرى باعتبارها فرد عادى . فشخصية الدولة فى الواقع واحدة لا تتجزأ .

لذلك لجأ القضاء إلى تقرير الحصانة القضائية للدولة ليس على أساس اختلاف الصفة التى تظهر بها الدولة فى النزاع وإنما على أساس طبيعة العمل الذى ثار النزاع بشأنه .

---

(٥) انظر الحكم الصادر من محكمة الاستئناف المختلطة سنة ١٩٣٠ فى قضية
Monopole de Tabac de Turquie
منشور فى Bulletin, T. 42 (1929–30), p. 214. وانظر كذلك الحكم الصادر من محكمة الاستئناف المختلطة الصادر فى ٣ يناير سنة ١٩٤٨ منشور فى
Revue Hellénique de Droit International, 1948, p. 279.

(٦) منشور فى Bulletin, T. 54 (1941–2), p. 243.

فاذا كان العمل الذى قامت به الدولة الأجنبية يعد عملا من أعمال السيادة Jure imperii امتنع على القضاء الوطنى النظر فى النزاع .

أما إذا كان العمل الذى قامت به الدولة الأجنبية يعد من أعمال الإدارة العادية التى لا تتصل بالسلطـــة العامة Jure gestiones جاز للمحاكم الوطنية النظر فى النزاع .

غير أن هذا المعيار يعيبه عدم الدقة لصعوبة التمييز أحياناً بين التصرفات التى تعتبر من أعمال السيادة وتلك التى تعتبر من أعمال الإدارة العادية .

وقد اعتبرت بعض المحاكم تصرفات معينة من أعمال السيادة بينما اعتبرت محاكم أخرى تصرفات شبيهة بها من أعمال الإدارة .

فقد حدث مثلا أن رفعت سيدة دعوى ضد الجمهورية العربية المتحدة سنة ١٩٦٠ أمام المحاكم السويسرية بشأن إيجار مسكن للبعثة الدبلوماسية العربية بفيينا ، ودفعت الجمهورية العربية بالحصانة . غير أن المحكمة الفدرالية العليا رفضت هذا الدفع باعتبار أن عقد إيجار المسكن يعتبر من أعمال الإدارة العادية وليس من أعمال السلطة العامة التى تخرج من ولاية القضاء[٧] .

وذلك فى حين أن محكمة النقض الفرنسية أصدرت حكماً عكسياً فى دعوى متعلقة بعقد شراء سجائر أبرمته دولة فيتنام لجيشها ؛ إذ قبلت المحكمة دفع دولة فيتنام بالحصانة باعتبار أن عقد الشراء هذا يعتبر عملا من أعمال السلطة العامة[٨]

وقد اتجه الفقه الحديث فى تحديد حصانة الدولة إلى أعمال معيار جديد مقتضاه وجوب معاملة الدولة الأجنبية نفس المعاملة التى يعامل بها القاضى الوطنى دولته ذاتها . أى أنه يتعين البحث فى هذه الحالة عما كان يمكن أن يفعله القاضى الوطنى لو كانت نفس الدعوى مرفوعة ضد دولته هو .

---

(٧)

Dame X c. République Arabe Unie : Entscheidungen des Schweizerischen Bundesgerichtes, t. 86, p. 23.

(٨)

Guggenheim c. Etat de Vietnam : Revue critique de Droit International privé, 1962, p. 350.

وبعبارة أخرى يتعين على القاضى ألا يخص الدولة الأجنبية بمعاملة تختلف عن تلك التى يعامل بها دولته .

فاذا ما تبين للقاضى الوطنى أنه كان سيمتنع عن نظر المنازعة إذا كانت دولته طرف فيها ، امتنع عليه النظر كذلك فى الدعوى المماثلة المرفوعة ضد الدولة الأجنبية ، أى تعين عليه القضاء بحصانة الدولة الأجنبية .

أما إذا اتضح للقاضى الوطنى أن المنازعة كانت ستدخل فى ولايته إذا كانت دولته نفسها طرفاً فى النزاع وجب عليه نظر الدعوى المماثلة التى تكون الدولة الأجنبية طرفاً فيها ، أى تعين فى هذه الحالة رفض الحصانة للدولة الأجنبية [٩] .

غير أن هذا المعيار معيب بدوره . ذلك أن اعفاء الدولة الأجنبية من الخضوع للقضاء الوطنى لا يجب أن يرتبط بالمعاملة التى تلقاها الدولة الوطنية من قضائها . فالاعتبارات المهيمنه على عدم اختصاص القاضى بنظر المنازعة ليست واحدة فى كلتا الحالتين : فالواقع أن عدم خضوع بعض أعمال دولة القاضى للسلطة القضائية إنما يرجع إلى اعتبارات مستمدة من مبدأ الفصل بين السلطات فى الدولة ذاتها ، وذلك فى حين أن اعفاء الدولة الأجنبية من الخضوع للقضاء الوطنى يرجع إلى اعتبارات تتصل بكيان المجتمع الدولى بأسره .

وبالرغم من أن الاتجاه الحديث فى غالبية الدول يميل إلى الحد من

(٩) انظر فى هذا المعنى حكم محكمة استئناف باريس الصادر فى ١٦ مارس سنة ١٩٦٠ فى قضية

Cité fleurie La Fayette c. Etats-Unis d'Amérique : Clunet, 1962, p. 132.

وانظر كذلك حكم محكمة النقض الايطالية الصادر سنة ١٩٤٧ فى قضية

Tani c. Délégation commerciale russe : Foro Italiano, 1948, I, p. 855.

والحكم الصادر من نفس المحكمة سنة ١٩٥٦ فى قضية

Royaume de Grèce c. Gamet : Rivista di Diritto Internazionale, 1958, p. 123.

الحصانة القضائية للدولة الأجنبية إلا أن بعض الدول لا زالت تتمسك بوجوب تمتع الدولة بحصانة مطلقة أمام قضاء الدول الأخرى . ويتزعم هذا الفريق دولتان من الدول الكبرى هما الاتحاد السوفيتى من ناحية والمملكة المتحدة من ناحية أخرى .

والواقع أن استمرار الاتحاد السوفيتى وكذلك الديمقراطيات الشعبية فى التمسك بالحصانة المطلقة للدولة مرجعه الوضع الخاص الذى يتميز به الاتحاد السوفيتى فى المعاملات الدولية . فمن المعلوم أن هذه الدول تقوم باحتكار التجارة الخارجية احتكاراً تاماً ، ومن ثم فمن مصلحتها المطالبة بالحصانة المطلقة حتى تكون فى مأمن من الخضوع للقضاء الأجنبى بالنسبة لكافة الدعاوى التى ترفع عليها بمناسبة مباشرتها لنشاطها التجارى(١٠). هذا فضلا عن أن الأخذ بالحصانة المطلقة هو النتيجة المنطقية لمبدأ السيادة المطلقة ومبدأ المساواة اللتان ينادى بهما الاتحاد السوفيتى كأساس لعلاقات الدول بعضها بالبعض ؛ ففكرة السيادة المطلقة للدولة تتنافى مع اخضاعها لقضاء دولة أخرى دون رضاها(١١).

أما تمسك المحاكم البريطانية بنظام الحصانة المطلقة فمرجعه تأثر النظام الإنجليزى بفكرة المجاملة الدولية التى تحبذ عدم اخضاع الدولة الأجنبية لسلطان القضاء الوطنى . هذا فضلا عن أن النظام القضائى البريطانى يقوم على فكرة السابقة القضائية . فالقاضى البريطانى يتعذر عليه أن يحيد عما استقر عليه القضاء فى الماضى . وقد أدى ذلك إلى استمرار أخذ القضاء البريطانى

---

(١٠) انظر فى ذلك بصفة خاصة Bogouslavski : Immounitét gossoudarstva. ص ١٢ وما بعدها وانظر كذلك Levine : Diplomatitcheski immounitét. ص ٣٥٩ .

(١١) انظر فى هذا المعنى حكم محكمة النقض البولندية الصادر سنة ١٩٥٨ والمنشور فى
International Law Reports, 1958(Vol. 2), p. 178.
وانظر كذلك الحكم الصادر من المحكمة العليا التشيكوسلوفاكية الصادر سنة ١٩٥٥ والمنشور فى
International Law Reports, 1955, p. 242.
وكذلك الحكم الصادر من المحكمة العليا بيوغوسلافيا الصادر سنة ١٩٥٦ والمنشور فى
International Law Reports, 1956, p. 431.

بمبدأ الحصانة المطلقة للدولة بالرغم من عدول الكثير من الدول الأخرى عن هذا المبدأ[12].

* * *

ويبدو لنا أن الخلاف القائم حول مدى حصانة الدولة الأجنبية إنما مرجعه عدم صحة الأساس الذى قيل به فى تبرير هذه الحصانة .

ففكرة السيادة التى قام عليها مبدأ الحصانة أساساً هى فى الواقع سلاح ذو حدين . ذلك أنه إذا نظرنا إلى فكرة السيادة من وجهة نظر الدولة الأجنبية لأمكننا القول فعلا بوجوب تمتع الدولة الأجنبية بحصانة قضائية مطلقة وعدم خضوعها بأى حال من الأحوال للقضاء الوطنى . أما إذا نظرنا إلى فكرة السيادة من وجهة نظر دولة القاضى لأدى ذلك إلى نتيجة عكسية . فسيادة دولة القاضى تقتضى وجوب خضوع جميع المنازعات التى تثور داخل إقليم دولة القاضى لسلطانه الإقليمى . فاذا ما حرمنا القضاء الوطنى من النظر فى المنازعات التى تثور فى إقليم دولته بحجة أن هناك دولة أجنبية طرف فى النزاع لكان فى ذلك بلا شك اهدار لسيادة دولة القاضى على إقليمها .

والرأى عندنا أن تحديد مدى حصانة الدولة القضائية ، أو بعبارة أخرى تحديد مدى اختصاص محاكم الدولة بنظر الدعاوى المرفوعة ضد الدولة الأجنبية يجب أن يتم وفقاً للأساس الذى تقوم عليه مختلف حلول القانون الدولى الخاص فى الفكر الحديث . فالحلول التى يضعها هذا القانون تقوم الآن على تحقيق التناسق بين النظم القانونية المختلفة أو بعبارة أبسط تقوم على فكرة

---

(١٢) انظر حكم المحكمة العليا الانجليزية الصادر سنة ١٩٥٧ فى القضية الشهيرة منشور فى:
Rahimtoola v. Nizam of Hyderabad : All England Reports, 1957 (Vol. 3), p. 441.

التعايش المشترك بين الدول (١٣).

وقد أدى إعمال هذه الفكرة فى مجال تنازع القوانين إلى تخلى القاضى عن تطبيق القانون الوطنى وتطبيق قانون الدولة الأجنبية وذلك كلما كانت العلاقة القانونية أكثر تعلقاً بالنظام القانونى الأجنبى منها بالنظام القانونى الوطنى .

ويمكن فى الواقع إعمال نفس هذه الفكرة بالنسبة للحصانة القضائية للدولة . فيتعين فى رأينا على القاضى الوطنى الامتناع عن الفصل فى المنازعات التى تكون الدولة الأجنبية طرفاً فيها كلما كانت المنازعة وثيقةالصلة بهذه الدولة.

ولكن متى يعتبر النزاع وثيق الصلة بالدولة الأجنبية بحيث يتعين على القاضى الوطنى التخلى عن نظر المنازعة وتقرير الحصانة القضائية للدولة الأجنبية ؟

من غير المستساغ بطبيعة الحال أن نعتبر مجرد كون الدولة الأجنبية طرفاً فى النزاع مبرراً كافياً لتخلى القاضى الوطنى عن نظر الدعوى . فلكى يعتبر النزاع وثيق الصلة بالدولة الأجنبية يتعين فى رأينا أن يكون هذا النزاع متعلقاً باحدى وظائف الدولة الأجنبية . ففكرة التعايش المشترك بين الدول تقتضى عدم التدخل فيما يعتبر من صميم وظائف الدولة الأجنبية وبالتالى وجوب إعفاء الدولة الأجنبية من الخضوع للقضاء الوطنى بالنسبة للمنازعات المتعلقة بوظائفها . أما المنازعات التى لا تتصل بقيام الدولة الأجنبية باحدى وظائفها ، فيبدو لنا أنه ليس هناك ما يبرر اخراجها من ولاية القضاء الوطنى ، إذ لن يكون ثمة مساس بكيان الدولة الأجنبية فى اخضاع هذه المنازعة للقضاء الوطـــنى .

---

(١٣) انظر فى هذا المعنى

Batiffol : Aspects philosophiques du droit international privé, p. 16.

وانظر كذلك :

Lunz : Problems of private international law in the relations between the countries of the world socialist system.

منشور فى

Soviet Yearbook of International Law, 1959, p. 82.

ويجب الرجوع إلى النظام الاقتصادى والسياسى فى الدولة الأجنبية لمعرفة ما إذا كان النشاط محل النزاع يدخل فى الإطار الوظيفى لهذه الدولة . فالنظام الاقتصادى والسياسى لكل دولة هو الذى يحدد ما يدخل فى نطاق وظائفها : فالدول ذات النظم الاشتراكية تدخل فى نطاق وظائفها نواح من النشاط لا تعد كذلك فى الدول ذات النظم الرأسمالية .

فاذا كان النظام القانونى للدولة الأجنبية لا يعتبر النشاط محل النزاع داخلا ضمن وظائف الدولة إنتفت الحكمة من امتناع القاضى الوطنى عن نظر المنازعة ، إذ أن المقصود من الحصانة هو تمكين الدولة الأجنبية من أداء ما تعتبره هى جزءاً من وظائفها . أما إذا كان النظام القانونى للدولة الأجنبية يعتبر النشاط محل النزاع داخلا ضمن وظائف الدولة الأجنبية تعين امتناع القاضى الوطنى عن نظر المنازعة .

بيد أن امتناع القاضى الوطنى عن نظر منازعة تدخل أصلا فى اختصاصه يعتبر حداً من نطاق الولاية القضائية لدولته ومن ثم فأنه من غير المستساغ اخضاع مثل هذا التحديد لما تقرره الدولة الأجنبية وحدها ، بل يتعين اشراك النظام القانونى لدولة القاضى فى هذا التحديد .

وإشراك نظام دولة القاضى فى هذا التحديد لا يعنى وجوب كون النشاط محل النزاع معتبراً ضمن وظائف الدولة وفقاً لكل من نظامى دولة القاضى والدولة الأجنبية فعدم التطابق بين أنظمة الدول من الأمور المسلم بها فى المجتمع الدولى الحالى

وإنما المقصود باشراك نظام دولة القاضى هو عدم تقرير الحصانة إذا ما وجد تعارض صارخ بين نظام دولة القاضى ونظام الدولة الأجنبية ، وذلك تحقيقاً لفكرة التعايش المشترك السابق الإشارة إليها .

نخلص مما تقدم بأنه فيما يتعلق بالحصانة القضائيةللدولة الأجنبية يتعين فى رأينا على القضاء الوطنى الامتناع عن نظر المنازعات التى تكون الدولة

الأجنبية طرفاً فيها وتقرير الحصانة القضائية للدولة الأجنبية إذا اتصل النزاع باحدى وظائف الدولة الأجنبية طالما لم يكن هناك تعارض صارخ بين وجهتى نظر الدولتين .

المبحث الثانى

الحصانة القضائية للمشروعات العامة

فاذا ما انتهينا من تحديد مدى حصانة الدولة الأجنبية أمام القضاء الوطنى ، انتقلنا إلى بحث مدى تمتع المشروعات العامة المملوكة للدولة بالحصانة القضائية والفصل فى هذا الموضوع يعتبر فى الواقع من أدق الأمور التى تواجه القضاء فى مختلف الدول . وترجع صعوبة هذه المشكلة إلى الطبيعة المركبة التى تتصف بها المشروعات العامة : فالمشروعات العامة كما سبق أن ذكرنا مملوكة الدولة إما عن طريق التأميم وإما عن طريق إنشاء مشروعات جديدة ابتداء . غير أن هذه المشروعات من ناحية أخرى تتمتع بشخصية قانونية قائمة بذاتها ومستقلة عن شخصية الدولة التى تنتمى إليها ، فهذه المشروعات تستطيع التعاقد باسمها الخاص كما أنها مسئولة عن التزاماتها .

وقد أدت هذه الطبيعة المركبة للمشروعات المؤممة والمشروعات العامة إلى إثارة الجدل حول مدى امكان تمتع هذه المشروعات بالحصانة القضائية .

هل يعتبر تملك الدولة للمشروع العام وهيمنتها على إدارته مسوغاً كافياً لشمول المشروع العام بالحصانة التى تتمتع بها الدولة ؟

أم هل يعتبر استقلال الشخصية القانونية للمشروع العام عن شخصية الدولة سبباً كافياً لحرمانه من أية حصانة قضائية ؟

ذهب قضاء الدول فى هذا الصدد مذاهب شتى :

فرأت بعض المحاكم أن أهم ما يميز المشروع العام أو المؤمم هو تمتعه بشخصية قانونية مستقلة عن الدولة التى ينتمى إليها . ومن ثم قررت عدم امكان

شموله بالحصانة القضائية . وقد قضت المحاكم الألمانية والفرنسية والامريكية بذلك فعلا فى أحكامها الحديثة ، إذ رفضت منح الحصانة لبنوك مملوكة لدول أجنبية تأسيساً على أن هذه البنوك تتمتع بشخصية قانونية قائمة بذاتها[١٤] وقد سبقتها فى الأخذ بهذا المعيار المحاكم المختلطة فى مصر[١٥] . وجدير بالذكر أن اللجنة القانونية للمؤتمر الأفريقى الآسيوى قد أوصت بالأخذ بالمعيار المذكور فى دورتها المنعقدة بالقاهرة سنة ١٩٥٨ .

واتجهت بعض المحاكم الأخرى إلى الاعتداد بالغرض الذى يقوم المشروع العام بتحقيقه فقررت منح الحصانة للمشروع العام الذى قصد من إنشائه تحقيق غاية وطنية بغض النظر عن تمتعه بشخصية قانونية مستقلة عن الدولة التى أنشأته . وقد برز هذا المعيار بصفه خاصة فى إحدى القضايا الشهيرة التى طرحت أمام القضاء الأمريكى منذ بضعة أعوام . ففى دعوى رفعت أمام القضاء الأمريكى ضد شركة البترول الأنجلو ايرانية دفعت الشركة بالحصانة القضائية ، واستندت فى دفعها إلى أن الغرض من إنشائها هو تزويد البحرية البريطانية بالوقود وهو أمر لازم لكيان دولة بريطانيا . وقد أقرت المحاكم الأمريكية هذا الدفع وقضت بشمول شركة البترول الأنجلوايرانية بالحصانة القضائية[١٦] وعلى ذلك يكفى لكى يتمتع المشروع العام بالحصانة وفقاً لهذا

---

(١٤) انظر الحكم الصادر من المحكمة الفدرالية العليا بألمانيا فى ٧ يونيو سنة ١٩٥٥ والمنشور فى :
Neue Juristische Wochenschrift, 1955, p. 1435.

وانظر حكم محكمة استئناف نيويورك الصادر فى ١٢ ديسمبر سنة ١٩٦١ فى قضية
Stephen v. Zivnostenska Banka, 222, N.Y.S. (2d.), p. 128.

وانظر كذلك حكم محكمة السين الصادر فى ١٥ يونيه سنة ١٩٥٥ المنشور فى
Gazette du Palais, 1956, II, p. 16.

(١٥) انظر حكم محكمة الاستئناف بالإسكندرية الصادر فى ٢٩ نوفبر سنة ١٩٢٤ فى قضية
Giovanni Borg c. Caisse National d'Epargne Française. Gazette des Tribunaux Mixtes d'Egypte, t. 16 (1925–26), p. 123.

(١٦) انظر
In re–investigation of world arrangements with relation to the production transformation, refining and distribution of petroleum : International Law Reports, 1952. Case No. 41, p. 197.

الرأى أن يكون المشروع قد أنشىء لتحقيق غاية وطنية .

وقد ذهبت محكمة النقض الفرنسية أخيراً إلى وضع معيار جديد مقتضاه النظر إلى الصفة التى يتعامل بها المشروع العام[١٧]. فقد حدث أن قررت الحكومة الأسبانية تغيير العملة الأسبانية وسمحت للأشخاص المقيمين بالخارج باستبدال ما لديهم من عملات قديمة عن طريق التقدم بها إلى البنوك الأسبانية . وتنفيذاً لهذا القرار تقدم بعض الرعايا الفرنسيين بالعملات القديمة التى فى حيازتهم إلى بنك أسبانيا لاستبدالها بعملات جديدة غير أن البنك ماطل فى تسليمهم العملات الجديدة خلال عدة سنوات ، فرفع هؤلاء الأشخاص دعوى ضد البنك أمام القضاء الفرنسى مطالبين بتسليمهم العملات الجديدة . دفع البنك بالحصانة مستنداً إلى كونه مشروعاً عاماً مملوكاً للحكومة الأسبانية . ورد الخصوم الفرنسيون على هذا الدفع بأن البنك يتمتع بشخصية قانونية مستقلة عن الدولة الأسبانية كما أنه يقوم بعمليات تجارية باسمه الخاص ومن ثم فلا يجوز تمتعه بالحصانة . غير أن محكمة النقض الفرنسية حكمت بشمول البنك بالحصانة . وأسست حكمها على أن البنك فى هذه العملية بالذات (أى عملية تغيير العملة) كان خاضعاً فى تصرفاته لتعليمات وأوامر مباشرة من الحكومة الأسبانية . فالبنك لم يتصرف فى هذه الحالة إلا بوصفه ممثلا للحكومة الأسبانية فى عمل من أعمال السيادة ، وبذلك كانت الصفة التى تعامل بها البنك هى الأساس الذى تحددت بمقتضاه الحصانة .

* * *

يتضح مما سبق أن قضاء مختلف الدول لم يصل إلى حل موحد بشأن الحصانة القضائية للمشروع العام . ويبين لنا أن مرجع ذلك هو عدم محاولة القضاء تحديد مركز المشروع العام من الدولة التى أنشأته فى المجال الدولى

---

(١٧) انظر حكم محكمة النقض الفرنسية الصادر فى ٣ نوفبر سنة ١٩٥٢ فى قضية
Epoux Martin c. Banque d'Espagne. Revue Critique de droit International Privé, 1953, p. 425.

أى معرفة مدى اندماجه فى شخصية الدولة . وهذا التحديد يعتبر فى الواقع مسألة أولية لازمة للفصل فى حصانة المشروع العام .

ولما كانت الدولة ومرافقها تظهر فى المجال الدولى كوحدة متكاملة فأنه يمكن اعتبار المشروع العام جزء لا يتجزأ من الدولة فى المجال الدولى إذا ما ثبت أنه يرقى إلى مرتبة مرافقها ويدخل ضمن إطار أجهزتها .

وبدراسة المشروعات العامة فى مختلف الدول يتضح لنا أنه يمكن تقسيمها إلى نوعين :

النوع الأول مشروعات عامة تدخل فى عجلة النشاط الرئيسى للدولة وتعتبر ضمن الإطار المكون لأجهزتها وذلك بالرغم من تمتعها بشخصية قانونية مستقلة عن الدولة التى ينتمى إليها .

والنوع الثانى مشروعات عامة تقوم بنشاط لا يدخل فى عجلة النشاط الرئيسى للدولة وبالتالى لا تندرج فى الإطار العام لأجهزة الدولة .

وفى رأينا أن المشروع العام الذى لا يدخل ضمن إطار أجهزة الدولة الدولة ولا يعد مرفقاً من مرافقها لا يجوز معاملته فى المجال الدولى كجزء لا يتجزأ من الدولة . وعلى ذلك يتعين عدم شمول هذا المشروع بالحصانة القضائية واخضاعه للقضاء الوطنى فى جميع المنازعات التى يكون طرفاً فيها مثله فى ذلك مثل المشروعات الخاصة .

أما المشروع العام الذى يدخل ضمن الإطار المكون لأجهزة الدولة ، أى الذى يعتبر مرفقاً من مرافق الدولة الأجنبية ، فان هذا المشروع يندمج فى شخصية الدولة ويتعين معاملته معاملة الدولة ، فتقرر له الحصانة فى رأينا وفقاً لنفس المعيار الذى تتقرر به حصانة الدولة ، وهذا المعيار فى رأينا هو المعيار الوظيفى الذى سبق لنا الإشارة إليه .

ولكن كيف يقوم القاضى الوطنى بمعرفة ما إذا كان المشروع العام يعتبر مرفقاً من مرافق الدولة بحيث يتعين معاملته فى المجال الدولى كجزء لا يتجزأ من الدولة الأجنبية التى ينتمى إليها ؟

هل يأخذ القاضى بوجهة نظر الدولة الأجنبية التى ينتمى إليها المشروع العام أم يأخذ بوجهة نظر دولته هو فى تحديد المشروعات التى ترقى إلى مرتبة مرافق الدولة ؟

لما كانت المشكلة تتعلق بتحديد ما يعتبر من مرافق الدولة الأجنبية فمن الطبيعى أن نرجع إلى النظام القانونى فى الدولة الأجنبية لمعرفة ما إذا كان هذا المشروع يدخل ضمن مرافق هذه الدولة أم لا . فمبدأ حرية الدولة فى تحديد اختصاصها يقتضى أن نترك لها حرية تحديد المشروعات العامة التى تعد ضمن مرافقها . فاذا ما قررت الدولة الأجنبية أن مشروعاً عاماً معيناً يدخل ضمن نطاق مرافقها تعين على القاضى الوطنى احترام هذا القرار ومعاملة المشروع العام الأجنبى نفس المعاملة التى كان سيعامل بها الدولة الأجنبية إذا كانت هى الطرف فى النزاع .

غير أنه من المتصور أن يمتنع القاضى الوطنى عن تقرير الحصانة القضائية للمشروع العام على الرغم من أن الدولة الأجنبية تعتبره من مرافقها إذا كانت وجهة نظر الدولة الأجنبية فيما يتعلق بتحديد مرافقها تتعارض تعارضاً تاماً مع وجهة نظر دولة القاضى . ولا يعد امتناع القاضى هذا عن تقرير الحصانة اعتداء على حرية الدولة الأجنبية فى تحديد ما يعد من مرافقها إذ أن القاضى الوطنى لا ينازع هنا فى حق الدولة الأجنبية فى تحديد مرافقها ، وإنما يرفض فقط الاعتراف بالآثار القانونية التى تترتب على هذا التحديد فى إقليم دولته هو ، أى يرفض شمول نشاط مثل هذه المشروعات العامة بالحصانة[18] .

---

(١٨) انظر فى دراسة مختلف أنواع المشروعات العامة
Bredin : L'entreprise semi-publique et publique et le droit privé (1957).

وانظر مجموعة الدراسات المقارنة فى :
Hanson : Public enterprise (1955).

وانظر فيما يتعلق بالمشروعات العامة فى الدول ذات النظم الاشتراكية .
Goppold : Der Staatsbetrieb als Juristiche Person in Sowjetischen Zivilrecht.

يتضح مما تقدم أن مشكلة تمتع المشروع العام بالحصانة القضائية ترتبط فى رأينا بتحديد ما إذا كان المشروع العام يعتبر مرفقاً من مرافق الدولة الأجنبية : فاذا اعتبر كذلك سرت فى مواجهته أحكام الحصانة القضائية التى تسرى بالنسبة للدولة التابع لها . وإذا لم يعتبر كذلك عومل معاملة المشروعات الخاصة ، أى خضع لولاية القضاء الوطنى [١٩].

* * *

بهذا نكون قد انتهينا من عرض مشكلة حصانة الدولة القضائية فى بعض مظاهرها الحديثة . وقد توخينا فى حل هذه المشكلة أن نضع معياراً موحداً يطبق بالنسبة لحصانة الدولة الأجنبية وبالنسبة لحصانة مشروعاتها العامة التى تعد جزءاً من مرافقها ، وهذا المعيار هو المعيار الوظيفى .

وقد راعينا فى هذا المعيار أن يكون من المرونة بحيث يواجه التطور المستمر الذى يتسم به نشاط الدولة ، كما راعينا أن يكون متمشياً مع الاتجاهات المتباينة التى تسود المجتمع الدولى الحالى .

---

(١٩) انظر فى تفاصيل هذا الرأى مجموعة محاضراتنا بأكاديمية القانون الدولى بلاهاى

L'entreprise publique et semi-publique en droit international privé.

منشور فى :

Recueil des Cours de l'Académie de Droit International, 1963, tome I.

الصور الجديدة للاعتراف

بقلم الدكتورة عائشة راتب

قررت حكومة الجمهورية العربية المتحدة أخيراً الاعتراف بالدول المقسمة فى آسيا إذا طلبت منها هذه الدول الاعتراف . وقد اتخذت القاهرة هذا القرار اعتماداً على أن الوضع القائم الآن فى هذه الدول المقسمة أصبح حقيقة واقعة وأن تجاهل هذا الوضع لا يضيف جديداً إلى الموقف[1] .

ويفترض لفظ « الدول المقسمة » وجود الدولة ذات السيادة أولا فى المجتمع الدولى ثم انفصال جزء منها وتكوينه لدولة جديدة . وحتى فى الحالة الأخيرة يصبح لكل دولة ذاتيتها وشخصيتها الدولية المستقلة ولا يجوز بالتالى إطلاق لفظ « الدول المقسمة » عليها إذ تستقل كل منها بنفسها ويكون لها فى المفهوم الدولى للجماعة الدولية اسم خاص بها . فهل يتحقق هذا الوضع فى دول كوريا الشمالية والجنوبية وفيتنام الشمالية والجنوبية وهل كانت كل منها تكون قبل الحرب العالمية الثانية وبعدها مباشرة أقاليما موحدة لدولة واحدة أم قامت كل منها منذ استقلالها على إقليم محدد معين فعلا ؟ وهل يجوز لأى منها الاحتجاج لدى الجمهورية العربية المتحدة على قيامها بالاعتراف بالأخرى ؟ كل هذه أسئلة يجب الرد عليها أولا حتى نتعرف على حقيقة الوضع القانونى للاعتراف بهذه الدول . ومما يفيد هنا مقارنة الاعتراف بالوضع القانونى لهذه الدول ، بالاعتراف بالوضع القانونى الدولى لجارتهم الكبرى جمهورية الصين حتى نتعرف على أوجه الشبه أو أوجه الخلاف مما يسمح لنا بالوصول إلى نتيجة محددة .

---

(١) الأهرام ، سبتمبر ١٩٦٣ . وقد تفضل السيد مدير الإدارة الآسيوية بوزارة الخارجية مشكوراً باخبارى أن المقصود بذلك فيتنام وكوريا .

ألقيت هذه المحاضرة بدار الجمعية المصرية للقانون الدولى فى ١٢ مارس سنة ١٩٦٤

وقبل أن نعرض لدراسة الوضع القانونى لهذه الدول ، يحسن بنا فى البدء أن نحدد المعنى المقصود بالدول ذات السيادة ثم نلحقه بلمحة سريعة عن الاعتراف بالدولة والاعتراف بالحكومة والاعتراف فى المنظمات الدولية .

أولا — الدول ذات السيادة[1] :

العلاقات الدولية هى أهم مظاهر الحياة الدولية الحديثة ، ومهما اختلفت العوامل التى تشكل السياسة الخارجية للدول ، فأنها تنبع أساساً من التصرفات البشرية والرغبات الجماعية والفردية التى تمارس فى النطاق الإقليمى لكل دولة وتتشكل بخصائص شعب هذا الإقليم وبشكل حكومته ، وبالحالة الاقتصادية والزعامات الفردية التى توجد فى وقت معين ، وكذلك بالنظريات والأفكار التى يتبناها الرأى العام داخل الدولة . والعلاقات الدولية يتم تبادلها بين أشخاص القانون الدولى . ولا يخفى أن معنى لفظ « الشخص القانونى » لنظام معين يختلف تبعاً لوجهة النظر التى يتخذها الباحث أساساً لبحثه . إلا أن المعنى القانونى الذي يرتبه اللفظ هو سلطة القيام بعمليات ترتب عليها القواعد القانونية الآثار القانونية اللازمة كما تشمل اعطاء الشخص القانونى أهلية التمتع بالحقوق ، وبمعنى آخر حرية التصرف داخل النطاق القانونى المعين . والقواعد القانونية التى يقررها نظام معين هى التى تقوم بتحديد الأشخاص المخاطبين بأحكامه . وتطبيقاً لهذه القاعدة تقوم القواعد القانونية الدولية بتعيين الأشخاص

---

(١) انظر : حامد سلطان ، القانون الدولى العام فى وقت السلم ، ١٩٦٢ ، صفحة ٨٨ . أبو هيف ، القانون الدولى العام ، ١٩٦١ ، ص ١٥٨ . حافظ غانم ، مبادئ القانون الدولى العام ، ١٩٦٣ ص ٢٦٥ . وأيضاً مقالة

Henri Rolin. Les principes de droit international public, Rec. des Cours 1950, p. 321. J.P.A. François, Règles générales du droit de la Paix, Rec. des cours, 1948, p. 70.

عائشة راتب ، التنظيم الديبلوماسى والقنصلى ، ١٩٦٣ ، ص ٤ . المنظمات الدولية الإقليمية والمتخصصة ، ١٩٦٢ ص ١٥٧ .

الذين توجه إليهم أحكام القانون الدولى[1]. ونظراً لعدم وجود المشرع فى المجتمع الدولى ، يقع على الدول عبء وضع القواعد القانونية الدولية ، كما أنها تخاطب ، فى نفس الوقت ، بأحكامها . وتقوم الدول بوضع القواعدالدولية عن طريق الاتفاقات المختلفة التى تشترك فيها بملء حريتها ، كما تلتزم بالتالى باحترامها تطبيقاً لقاعدة العقد شريعة المتعاقدين . ونخلص من ذلك إلى أن القواعد الدولية تفترض مساهمة أكثر من دولة فى وضعها أى تفترض وجود جماعة تتقيد بالأحكام التى تقوم بوضعها الوحدات المختلفة لها .

والجماعة الدولية تضم مجموعة من الدول ذات السيادة ، قد تتفاوت فى القوة ، ولكنها تتساوى فى الحقوق والواجبات ، وتختص كل منها بممارسة السلطة والقضاء فى حدود إقليمية معينة . والمتفق عليه اشتراط توافر عناصر ثلاثة فيها وهى وجود : شعب ، إقليم ، وتنظيم سياسى[2] أى أن توجد جماعة سياسية منظمة فى حدود إقليم معين . ويلاحظ أن هذا التعريف قد ينطبق على الوحدات الإدارية الداخلية : كالأقاليم والإدارات والدول التعاهدية والدول التابعة . ولذلك فقد استقرت القواعد الدولية على اشتراط عنصر آخر هو عنصر السيادة . وقد وجهت إلى العنصر الأخير انتقادات عدة ذلك أنه إذا كانت الضرورات تحتم سيادة الدولة فى النطاق الداخلى على أى سلطة أخرى ، فان هذا اللفظ قد أضفى النظام الدولى عليه معنى آخر . فاستخدم هذا اللفظ

---

(١) Azkin, Les problèmes fondamentaux du D.I.P. thèse, Paris, p. 123. Georges Chklaver, R.D.I.P. 1927, p. 422.
ورسالة الفرد والقانون الدولى لعائشة راتب ، ١٩٥٥ ، ص ١٦ .

(٢) وقد يكون هذا من عناصر جديدة أو من عناصر قديمة أى قد تتكون الدولة على إقليم غير مأهول أو تقطنه قبائل همجية وما يتبعه من تطور هذه الجماعة حتى تستكمل جميع عناصر الدولة وتثبت وجودها كوحدة سياسية قائمة بذاتها ، وقد تتكون على إقليم كان يخضع لسلطان دولة أخرى ، وهذه الصورة لها ثلاث أشكال :

(أ) إعلان باستقلال جزء من دولة أو مستعمرة .

(ب) تكوين دولة جديدة باتحاد مجموعة من الدول .

(ج) تكوين دولة جديدة على إقليم زاد أو قل من دولة قديمة .

وسيلة للتعبير عن مبدأين : المبدأ الأول هو عدم وجود السلطة العليا الدولية التى تستطيع فرض قراراتها على الدول ، والمبدأ الثانى هو مبدأ المساواة بين الدول قانوناً . واستقر العرف على اعطاء السيادة معنى سلبياً سمح للفقه التقليدى ببناء الجماعة الدولية كجماعة من الدول ذات السيادة . ويترتب على ذلك ، أن سيادة الدولة لا زالت هى الصفة المميزة قانوناً لأفراد الجماعة الدولية[1] ولا زالت الدول[2] هى التى تقوم بوضع القواعد والأحكام الدولية سواء

---

(١) اقتصرت الجماعة الدولية فى البدء على دول أوربا المسيحية ، ولم تتمتع روسيا بعضويتها إلا فى نهاية القرن ١٧ ، والولايات المتحدة عام ١٧٨٣ ، وبلاد أمريكا اللاتينية فى القرن ١٩ . وبعد قبول تركيا عام ١٨٥٦ ، اتسعت الدائرة لتشمل الدول الغربية غير المسيحية والآن هى تشمل كافة دول العالم تقريباً . انظر :

Paul Guggenheim : Traité de droit international public, Tome I, 1953, p. 16. Percy Corbett : Law and Society in the Relations of States, New York, 1951, chs. 2–4. Edwin D. Dickinson :Law and Peace, Philadelphia, 1951, ch. I, Sir, Alfred Zimmern, International Law and Social Consciousness, Grotius Society Transactions, London, 1935, vol. XX, pp. 25–44.

انظر أيضاً :

Bourquin : Droit international de la Paix, Sect. III, p. 24.
Delos : La Société internationale et les principes du droit international public, publication de la revue générale de Droit international public, 1929, p. 280.

(٢) والسيادة هى الاستقلال والاستقلال معناه عدم خضوع الدولة لسلطة دولة أخرى مثلها ، ولكنه لا يعنى مطلقاً عدم خضوع الدولة للقانون الدولى العام :

"It "independence" may also be described as sovereignty "Suprema Potesta" or external Sovereignty, by which is meant that the State has over it no other authority than that of international law."

انظر أنزيلوتى فى رأيه الملحق بالرأى الاستشارى الذى أصدرته محكمة العدل الدولية فى النزاع بين النمسا وألمانيا عام ١٩٢١ .P.C.I.J. Ser. A/B No. 41, 1931 كما ورد فى البروتوكول الخاص بحقوق الدول وواجباتها الذى أعدته لجنة القانون الدولى التابعة للأمم المتحدة والذى أقرته توصية الجمعية العامة بتاريخ ٢١ نوفبر سنة ١٩٤٧ ما يلى :

بالاتفاق الصريح أو بالاتفاق الضمنى ، وتلتزم بها فى تصرفاتها مع سائر أفراد الجماعة الدولية . فالدولة ذات السيادة هى فعلا المركز أو النواة التى يدور حولها قانون الشعوب .

وعلى خلاف النظم الداخلية التى تحتوى على التشريعات اللازمة لبيان شروط نشأة وتغير وفناء الأشخاص القانونية الخاضعة لها ، لا نجد مثل هذه القواعد التفصيلية فى النظام القانونى الدولى . وتترتب هذه المسائل عادة على عديد من الظروف المادية والاجتماعية والسياسية . ولا جدال فى أن الوحدة السياسية لا تتمتع بوصف الدولة ولا تصبح عضواً فى الجماعة الدولية آلياً ، وإنما يتوقف ذلك على قبولها والاعتراف بها من جانب الجزء الأكبر من الجماعة الموجودة . والاعتراف يلعب هنا دوراً كبيراً ، فالوحدة السياسية لا تصبح حقيقة قانونية إلا إذا اعترفت بها سائر الدول وتبادلت العلاقات معها . وقبل الاعتراف تمتلك الوحدة السياسية باعتبارها جماعة سياسية منظمة ، أهلية فعلية لاكتساب الشخصية القانونية الدولية . وهذه الأهلية الفعلية هى التى تمكنها من عقد هذا الاتفاق الأولى الذى تتحول به إلى أهلية قانونية يقوم بتمثيلها مجموعة من الهيئات الداخلية يسبغ القانون الدولى عليها وصف الهيئات الدولية .

ثانياً — الاعتراف بالدول الجديدة :

وتظهر أهمية هذه النقطة فى حالة تغيير الخريطة السياسية للعالم . فلا يكفى هنا أن تمر دولة « قديمة » بحالة ينقص فيها أو يزيد إقليمها على حساب أو

"Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that sovereignty of each state is subject to the Supremacy of international law." Year Book of the International Law Commission, 1949, p. 288, Art. 14.

انظر يحيى الجمل ، رسالة دكتوراه فى الاعتراف فى القانون الدولى العام ، ١٩٦٣ ص ٤٧ ، جامعة القاهرة .

لحساب دولة أخرى إذ نوجد هنا أمام حالة تعالجها القواعد القانونية الدولية تحت اسم الضم annexion . ولا يكفى أيضاً قلب نظام الحكم الموجود فى الدولة إذ نكون هنا أمام حالة اعتراف بالحكومات الجديدة . وإنما يجب كى ينشأ الاعتراف بدولة جديدة أن تدير الحكومة الجديدة أو تحكم شعباً وإقليما لم يدخل(على وجه التقريب) قبل ذلك ضمن إقليم وشعب دولة واحدة محددة.

ويبدو من ذلك أن ظهور الدولة الجديدة فى المجتمع الدولى هو عملية « مادية » يتوقف وجودها على عملية موضوعية يجب أصلا ألا تتداخل فيها الاعتبارات الذاتية الخاصة بالدولة المعترفة . ولهذا تأثر الفقه ، وله العذر ، وقال جزء منه بأن الدول الجديدة توجد بصرف النظر عن اعتراف الدول الأخرى وأن الاعتراف له أثر مقرر[1]. غير أن الواقع الدولى يرفض هذه

---

(١) تذهب النظرية المقررة إلى أن الوحدة الدولية متى اجتمعت لها العناصر اللازمة فى القانون الدولى العام لقيام الدولة فان ذلك فى حد ذاته يكفى للتقرير بأن الشخص القانونى قد وجد ويدخل تبعاً لذلك فى المجتمع الدولى دون حاجة إلى إذن له بالدخول فى صورة اعتراف . انظر يحيى الجمل المرجع السابق ، ص ١٢٥ . ويأخذ بها من الفقه العربى أبو هيف « وإذا ما نشأت « الدولة » ثبتت لها السيادة على إقليمها وعلى رعاياها دون نزاع ، لكنها لا تتمكن من ممارسة هذه السيادة فى الخارج ومباشرة حقوقها قبل الجماعة الدولية إلا إذا اعترفت هذه الجماعة بوجودها . فالاعتراف بالدولة بمثابة شهادة ميلاد لها . فهو لا يخرج عن كونه إجراء قانونى لإقرار مركز فعلى سابق عليه والامتناع عن الاعتراف بدولة جديدة من جانب دولة قديمة لا يحول دون تمتع هذه الدولة بشخصيتها الدولية وبالحقوق التى تؤهلها هذه الشخصية ، وغاية الأمر أنه قد يعوق ممارستها لسيادتها فى الخارج ولا يسمح لها بالدخول فى علاقات سياسية مع الدول التى لم توليها هذا الاعتراف » أبو هيف ، المرجع السابق ، ص ١٦١ . ويأخذ حافظ غانم بالنظرية المقررة أيضا ويقول « يجب عدم المغالاة فى إبراز قيمة الدول الأخرى فى نشوء الدولة . . واعتراف الدول لا قيمة له إذا لم تتوافر لدى الدولة محل الاعتراف جميع عناصر الدولة كما أنه لا يمنح الدولة الجديدة الشخصية الدولية ولا يعطيها صفة الدولة فهى توجد وتباشر حقوقها من يوم نشوئها . . وعدم الاعتراف بدولة ما من جانب بعض الدول لا يمنعها من مباشرة الحقوق التى تخولها لها شخصيتها الدولية ومن الدخول فى علاقات دولية مع الدول التى تتعامل معها » حافظ غانم ، المرجع السابق ، ص ٢٦٨ . وتذهب النظرية المنشئة إلى أن الإعتراف يترتب عليه تمتع الدولة بالشخصية القانونية الدولية أو كما يقول الدكتور حامد سلطان : « متى ثبتت القدرة التشريعية الدولية لوحدة معينة

الفكرة ، ذلك أن الوحدة المتحررة لا يمكنها المطالبة بوصف الدولة فى مواجهة الدول القديمة إلا إذا اعترفت لها الأخيرة بوصف الدولة . وعادة يتوقف ذلك على وجهة نظر الدولة المطالبة بالاعتراف ، فى الوضع الداخلى الموجود فى الدولة الجديدة[1]. وتترك القواعد الدولية للدول الأعضاء فى الجماعة الدولية سلطة تقديرية كبيرة فى الاعتراف بالدول الجديدة . فالاعتراف عملية حرة تختلط فيها الاعتبارات القانونية والتيارات السياسية[2] ، تمارسها الدولة وفقاً لمصالحها ورغباتها الخاصة . وليس لأى دولة أو جماعة ولو نظمت سياسياً الحق القانونى فى مطالبة الدول الأخرى بالاعتراف[3]. وتقرير الاعتراف لا يثير صعوبة إذا ما نشأت الدولة بطريق سلمى ولكن تثور الصعوبات إذا ما نشأت الدولة نتيجة لثورة أو لأعمال ارهابية أو عنف . وغالباً ما تفسر

ثبت لها بالتالى وصف الشخصية الدولية » . . وبما أن الاعتراف ما هو إلا الاتفاق الدولى الأول الذى ينشىء قواعد قانونية تخاطب أطرافه فانه يترتب عليه « . . أن يتمتع كل واحد منهم فى مواجهة الآخر بوصف الشخصية الدولية ، فالاعتراف بطبيعته تبادلى ومنشىء » ، حامد سلطان ، المرجع السابق ، ص ١٠٥ و ص ١٠٦ . انظر أيضا مقالة توماس باق :

"Abuse of Terms : "Recognition" : "War.", American Journal of International law, 1936. Vol. 30, p. 377.

(١) "The emphasis—and that emphasis is a constant feature of diplomatic correspondence—on the principle that the existence of a State (or of a government) is a question of fact signifies that, whenever the necessary factual requirements exist, the granting of recognition is a matter of legal duty." Lauterpacht, Recognition, Cambridge, p. 24.

(٢) أو كما يقول هنرى رولان :

"Si la reconnaissance étatique est un acte dit libre, c'est parce qu'elle est un acte mixte, mi juridique, mi politique".

المرجع السابق ، ص ٣٢٨ .

(٣) صرح جون فوستر دلاس عام ١٩٥٧ :

"Diplomatic recognition is always a privilege never a right." Corbett : Law in Diplomacy, Princeton, 1959, pp. 68–69.

دولة الأصل الاعتراف المبكر ، فى هذه الأحوال ، بأنه عمل « عدائى وتدخل غير مقبول من جانب الدول الأجنبية فى مشاكلها الداخلية »[1]. ولا يتم الاعتراف عادة إلا بانتهاء الثورة أو الحرب واستقلال الولاية أو الإقليم نهائياً عن دولة الأصل . وتلتزم الدول الأخرى بالتحقق من استقرار الأمور فى الدولة الجديدة ولكن ليس من الضرورى أن تنتظر لتقرير الاعتراف قبول الدولة القديمة لهذا الانفصال أو اعلانها من جانبها استقلال الدولة الجديدة[2].

والاعتراف الصحيح الكامل يسمى الاعتراف القـــانونى de jure وينتج عن كل مظاهر الإرادة التى يفهم منها بوضوح رغبة الدولة فى الاعتراف بالدولة الجديدة . والاعتراف القانونى لا يتضمن تقدير العوامل التى أدت إلى نشأة الدولة ولا يعنى اعتراف الدولة المعترفة بمشروعية قيام الدولة الجديدة ، وإنما يقتصر على تقرير رغبة الدولة فى الاعتراف رسمياً بوجود الجماعة الجديدة ويعبر عن ثقة الدولة فى مقدرتها على الاستقرار والدوام وعن رغبتها فى إنشاء العلاقات الدبلوماسية معها[3]. ويأخذ العمل أيضاً باعتراف

---

(١) قد تنظر دولة الأصل إلى الاعتراف المبكر باعتباره casusbelli وتقوم باعلان الحرب على الدولة التى قامت بالاعتراف . كما فعلت إنجلترا حينما اعترفت فرنسا باستقلال الولايات المتحدة عام ١٧٧٨ . وكما فعلت أسبانيا حين اعترفت الولايات المتحدة باستقلال كوبا سنة ١٨٩٨.

(٢) بل وقد تساعد دولة الأصل الدولة الجديدة فى سبيل الحصول على الاعتراف بها ، كما نصت على ذلك المعاهدة الإنجليزية البرمانية سنة ١٩٤٧ ، والمعاهدة الفرنسية الكامبودجية سنة ١٩٤٩ . انظر حافظ غانم ، المرجع السابق ص ٢٧١ . وأبو هيف المرجع السابق ص ١٦٦ و ١٦٧ . انظر أيضاً مقالة فيليب مارشال براون :

The Legal Effects of Recognition, A.J.I.D. Vol. 44, 1950, p. 617.

حيث يعرف الاعتراف بأنه :

"The determination of the nature and the extent of the relations between States".

(٣) "As applied to States or governments recognition is often held to be the act whereby the title to act as a government

فعلى de Facto وبه تعترف الدولة بوجود دولة أخرى وتدخل فى علاقات معها دون أن تصدر حكماً على استقرارها ودوامها . والواقع أن عملية الاعتراف كعملية قانونية لا يمكن أن تقيد بشروط معينة تسمح بالرجوع فيها ، أو الامتناع عنها نهائياً بمرور الوقت[1]. فالدولة القديمة طالما اعترفت للدولة الجديدة بوصف الدولة وبالشخصية القانونية الدولية فهى دولة مهما فعلت : سواء أكانت تدفع ديونها أم لا ، وسواء أكان لديها جهاز تنفيذى فعال أم لا . فالاعتراف لا يمكن تعليقه على شرط تصرف الدولة الجديدة تصرفات معينة فى المجتمع الدولى وإلا كان معنى ذلك تقييد سيادتها واستقلالها. ولا جدال أن تقسيم الاعتراف إلى قانونى وفعلى ما هو إلا عملية قانونية غير سليمة أرادت بها بعض الدول تبرير الاعتراف بأن وحدة معينة جديدة هى دولة تحقيقاً لبعض المصالح الخاصة ، فى نفس الوقت الذى أرادت فيه تفادى

---

or as a State is conferred in the sense that the government or State is thus admitted to the "Family of nations".

Marvin Jones, the Retroactive Effect of the Recognition of States and Governments, B. Y. B., 1935, p. 45.

كما ورد فى مشروع معهد القانون الدولى فى ١٩ أغسطس سنة ١٩٣٢ أن لفظ الاعتراف

"Usually refers to the nature and extent of diplomatic relations. The fact of the existence of States and governments is really not seriously questioned in actual practice. Relations of some sort between peoples are acknowledged and assumed as normal facts. The practical question is to define the nature and the extent of these realtions. This is clearly a question primarily of political rather than of judicial concern."

انظر :

Philip Marshall Brown, The Recognition of New States and New Governments, A.J.I.L., Vol. 30, 1936, p. 693.

(١) انظر :

Cavaré, Revue générale de droit international public, 1935, p. I.

النتائج الحتمية للاعتراف[1]. فتعاملت بذلك مع جماعة مستقلة تماماً كدولة ورفضت فى نفس الوقت اعطاءها وصف الدولة . وواقع الأمر أن الاعتراف الفعلى يتضمن الاعتراف القانونى كما أن الاعتراف القانونى يتضمن الاعتراف الفعلى .

هذا ويلاحظ أن الاعتراف قد يكون مخالفاً للنظام الدولى القانونى : كما لو تم إنشاء الدولة الجديدة بطريقة مخالفة للقواعد القانونية الدولية . وقد تقرر هذا المبدأ أثر إنشاء دولة منشوكيو بواسطة الجيوش اليابانية وارتبط منذ نشأته بنظرية الحروب العدوانية . وقامت باصداره الجمعية العامة لعصبة الأمم فى توصية بتاريخ ١١ مارس ١٩٣٢ قررت فيها[2] « إن « أعضاء » عصبة الأمم يلتزمون بعدم الاعتراف بأى حالة أو معاهدة أو اتفاق يكون نتيجة لاستعمال وسائل مخالفة لعهد العصبة أو لميثاق بريان كيلوج الخاص بمنع الالتجاء إلى

---

(١) "It is impossible for a State to say : "We admit you exist, but we don't recognise you." It is a contradiction in terms, and it only serves to disguise the desire to avoid the effects of recognition."

انظر توماس باتى ، المرجع السابق ص ٣٨١ .

(٢) "It is incumbent upon the members of the League of Nations not to recognise any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or the Pact of Paris".

انظر :

James wilford Garner, Non-Recognition of illegal territorial annexations and claims to sovereignty, A.J.I.L., Vol. 30, 1936, p. 679.

وقد علق ماكنير على مبدأ عدم الاعتراف بالحالات المخالفة لمعاهدات عصبة الأمم وميثاق باريس بأنها بالرغم من أنها قد تضر بالدول التى ترفض الاعتراف إلا أن :

"A policy of non-recognition of the consequences of the wrong-doing is the minimum which considerations of international decency require." McNair, The Stimson Doctrine of Non-Recognition — A Note on its legal Aspects. B.Y.B., 1933, p. 73.

الحروب »[1] وهى صياغة أخرى لنظرية ستمسون الأمريكية التى تقضى بعدم الاعتراف بالدول الجديدة إذا كان فى إنشائها مخالفة لالتزامات دولية عامة أو خاصة . وهو ما دعا جزءاً من الفقه الدولى إلى انتقاد مبدأ حرية الدولة فى الاعتراف لتعارضه مع مبدأ حرية الشعوب فى تقرير مصيرها الذى قرره ميثاق الأمم المتحدة فى المواد ١ / ٢ ، ٧٣ ، ٧٦ منه[2]. وإذا كان فى هذه الفكرة تجديد للمراكز القانونية إلا أنها تتعارض مع الصورة الحقيقية للمجتمع الدولى المعاصر الذى لم يقبل بعد ادخال هذا المبدأ ضمن القواعد القانونية الملزمة . ورغم أن المادة ١ / ٢ والمواد السابقة قد أشارت إلى حق الشعوب فى تقرير مصيرها إلا أن ميثاق الأمم المتحدة لم يعرف للأسف حق تقرير المصير ولم يبين طريقة استعماله ولم يفرض التزاماً على الدول الأعضاء بتطبيقه فوراً [3]. ويبدو لنا أن هذا الاتجاه الجديد جدير بالاهتمام خاصة وأنه يرمى إلى إعطاء الجماعات الوطنية الحق فى التنظيم السياسى على إقليم محدد وأن يكتسبوا وصف الدولة إذا ما تمكنوا من الحصول على حرياتهم[4].

---

(١) أقامت اليابان دولة مستقلة اسما على إقليم محتل وطالبت الدول الأخرى بالاعتراف بها أملا فى أن تصل إلى اعتراف الجماعة الدولية بنتيجة عملها .

(٢) وهو ما دفع الأمم المتحدة إلى التغاضى عن اعتراضات هولندا ، وقبول الاستماع إلى مندوبى جمهورية أندونيسيا الرسميين .

(٣) انظر حافظ غانم ، المرجع السابق ص ٢٨٨ .

(٤) "Il va de soi que toute nation a le droit de décider elle-même de son régime et de sa destinée, jusques et y compris sa sécession de l'Etat dont elle fait partie, de même qu'elle a le droit de se constituer en Etat nouveau. »

انظر :

M. Krylov, Notions principales du droit des gens, Rec. des Cours, 1947, vol. 70, p. 441.

ويلاحظ أخيراً أن الاعتراف التام يلزم السلطات الداخلية للدولة المعترفة . غير أن رفض الدولة الاعتراف بدولة أخرى أو تأخيرها فيه لاعتبارات سياسية لا يؤدى إلى نفس النتيجة . فمثل هذه الاعتبارات لا تمنع الإدارات والمحاكم من تقرير ما إذا كانت العناصر القانونية المتطلبة

ثالثاً — الاعتراف بالحكومات الجديدة :

والاعتراف بالحكومة الجديدة لا يثير اشكالا إذا تم تغيير الحكومة وفقاً للطرق الدستورية الداخلية . ويختلف الوضع إذا ما تغيرت الحكومة نتيجة لثورة داخلية : وتسمى حكومة الثورة فى هذه الحالة بالحكومة الفعلية .

والقواعد الدولية تمنع الاعتراف المبكر بالثوار أو بالحكومة الجديدة كما تمنع فى نفس الوقت الاستمرار فى رفض الاعتراف بحكومة أمسكت فعلا بمقاليد الحكم واستقرت أمورها تماماً[1]. وتراعى الدول عند الاعتراف بالحكومة الجديدة عادة عنصرين :

لوجود الدولة متوافرة أم لا ، برغم موقف الحكومة . وقد أخذ بهذا المعنى معهد القانون الدولى فى اجتماعه بأوسلو وأصدر التوصية التالية :

"La reconnaissance de jure d'un gouvernement implique celle de la compétence des organes judiciaires, administratifs ou autres, et l'attribution d'effets extra-territoriaux à leurs actes conformément aux règles du droit international, et notamment sous la réserve habituelle du respect de l'ordre public, même si ses actes avaient été accompli avant toute reconnaissance de facto antérieure. Ces effets extra-territoriaux ne dépendent pas cependant de l'acte formel de reconnaissance, ils doivent être admis par les juridictions et administrations compétentes lorsque, considérant notamment le caractère réel du pouvoir exercé par le gouvernement nouveau, ces effets sont conformes aux intérêts d'une bonne justice et à l'intérêt des particuliers". Annuaire de l'Institut de droit international, 1936, vol. II, p. 304.

(١) قد تخضع السلطة التقديرية التى تتمتع بها الدولة فى الاعتراف بالحكومات الجديدة لبعض القيود الاتفاقية .

فعاهدة واشنجطون بتاريخ ٢٠-١٢-١٩٠٧ بين كوستاريكا وجواتيمالا وهندوراس ونيكاراجوا وسلفادور تنص على عدم الاعتراف بالحكومات الجديدة :

"Jusqu'à ce qu'une représentation populaire, librement élue, ait sanctionné le nouveau régime ».

انظر فرنسوا ، المرجع السابق ص ٧٥ . كما تنص اتفاقية ٧ فبراير المنعقدة بين دول أمريكا الوسطى على أن الدول الموقعة :

أولا : سيطرة الحكومة الفعلية وقيامها بشئون الحكم فعلا داخل الدولة .

ثانياً : توقع استمرار هذه السيطرة لمدة معقولة مع وضوح قدرة ونية الحكومة الجديدة على الوفاء بالتزاماتها الدولية .

ويسهل على الدول التحقق من توافر العنصر الأول ، أما العنصر الثانى فليس من السهل معرفته . ذلك أنه إذا كانت نظرية الاعتراف بالحكومات الجديدة تتضمن وقوع مخالفة للنظم الدستورية الداخلية ، فان درجة هذه المخالفة أدبياً وقانونياً ترتبط بحكم الدولة المعترفة على استقرار ودوام النظام الجديد داخل الدولة . ومن الأمور التى تساعد على الحكم هنا معرفة الشعور الداخلى لأفراد الشعب . حقيقة أن رضاء المحكومين ليس عنصراً ضرورياً من عناصر الاعتراف إلا أن تفاوته بين الرضاء التام والفرحة بالنظام الجديد ،

"Ne reconnaîtront aucun gouvernement qui auront acquis le pouvoir... au moyen d'un coup d'Etat ou d'une révolution contre un gouvernement organisé, aussi longtemps que les représentants du peuple, librement choisis, n'auront pas constitutionnellement réorganisé le pays."

انظر : Arnold D. Mcnair, B.Y.B., 1930, p. 108.

كما أصدرت اللجنة الاستشارية العاجلة للدفاع السياسى عن القارة الأمريكية فى ٢٤ ديسمبر ١٩٤٣ التوصية « رقم ٢٢ » التالية :

"Recommending to the American Governments which have declared war on the Axis Powers or which have broken relation with them, that during the actual world war they should not proceed to the recognition of a new government established by forcebefore consulting among themselves for the purposes of determining whether said government complies with the inter-American agreements for the defense of the Continent, or before effecting an inter-change of information regarding the circumstances which brought about the creation of said governments".

وقد طبقت فعلا هذه التوصية على التغييرات الثورية التى تمت فى حكومات الأرجنتين وبوليفيا واكوادور وسلفادور وهو صورة للتدخل الجماعى فى العلاقات بين الدول الأمريكية . انظر فيليب مارشال براون ، فى مقالته عن الآثار القانونية للاعتراف ، ص ٦٢٤ المرجع السابق .

والرضاء المشحون بالكراهية يسمح للدول بالحكم الصحيح على مستقبل النظام الجديد[1]. هذا وإذا كان الاعتراف بالحكومة الجديدة يتضمن الاعتراف بوقوع مخالفة دستورية داخلية إلا أنه لا يتضمن ما يفيد مخالفة القواعد القانونية الدولية . وهو يفترض بداهة اعتقاد الدولة المعترفة فى قدرة الحكومة فى المحافظة على التزاماتها الدولية ، وهو ما تصرح به عادة الحكومات الجديدة . ولم يحدث إلا نادراً أن أنكرت حكومة جديدة التزاماتها الدولية السابقة[2] ، والحكومة التى لا تحترم التزاماتها الدولية تتعرض للمعاملة بالمثل من جانب الحكومات الأخرى وبالتالى يتعرض كل مستقبلها للخطر .

وتجب ملاحظة أن الاعتراف القانونى بالحكومة الجديدة لا يتضمن تقدير مشروعية الظروف التى نشأت فيها . وإنما يعبر عن ثقة الدولة التى قامت بالاعتراف فى استقرار الحكومة الجديدة وقدرتها على أداء واجباتها الدولية وعن الرغبة فى إنشاء العلاقات الدبلوماسية معها . ويأخذ العمل الدولى ، لإسباب معينة ، باعتراف فعلى : ذلك أنه إذا كان مبدأ استمرار الدولة يفيد ضرورة قبول مبدأ صحة الأعمال المختلفة التى تقوم بها الحكومة الفعلية المؤقتة فان حكومة

---

(١) وينادى جزء من الفقه الحديث بالامتناع عن الاعتراف بالنظم الثورية التى تقوم رغم إرادة الشعب . ويعللون ذلك بأن مبدأ حرية الشعوب فى تقرير مصيرها يقضى على صور العبودية التى تفرضها الديكتاتورية ،ويضيفون إلى ذلك أن إعلان حقوق الإنسان أقر فى المادة ٢١ منه مبدأ الحرية السياسية كما أن المادة ٥٥ من ميثاق الأمم المتحدة تقر حق الشعوب فى تقرير مصيرها . غير أن هذا القول لا يسنده الواقع الدولى المعاصر الذى لا يعطى لإعلان حقوق الإنسان ولأحكام الفصل التاسع من ميثاق الأمم المتحدة القوة القانونية الملزمة .

انظر رولان ، المرجع السابق ص ٣٣٥ .

(٢) رفضت الحكومة الثورية السوفيتية ، فى البدء ، الاعتراف بالتزامات روسيا الدولية كما رفضت دفع ديونها أو إحترام الممتلكات الأجنبية الموجودة بها . وقد استندت الولايات المتحدة على التصريحات التى أدلى بها رؤساء الحكومات الجديدة لتبرير رفض الاعتراف بها وأكدت بذلك أن عزم الحكومة الجديدة على احترام الالتزامات الدولية هو المعيار الأساسى للاعتراف بالإضافة إلى الاعتقاد فى استقرار نظام الحكم الجديد فى الحاضر والمستقبل . انظر كونسى رايت ، المرجع السابق ص ٣٢٦ .

الدولة التي لا ترغب في الاعتراف التام أو الكامل بحكومة فعلية معينة ، تضطر إلى الاعتراف بصورة أو بأخرى بوجود هذه الحكومة . وبالتالي فالمشكلة هنا ليست مشكلة كيفية إنشاء هذه العلاقات ، وإنما تنحصر في تحديد نوع ومدى هذه العلاقات[1] . وقد تقيدها بتحفظات أو باحتجاجات معينة إلا أنها تتضمن فعلا صوراً معينة للاعتراف .

والاعتراف بالحكومات الجديدة تتداخل فيه الاعتبارات السياسية أكثر من الاعتبارات القانونية . كما أنه لا يغير ، في شيء ، من طبيعة العمليات التي تمت في ظل النظام القائم فعلا . فاذا ما تم الاعتراف ، فأنه يصبغ هذه العمليات بالصبغة القانونية منذ القيام بها[2] . ولذلك فلا يهم من الوجهة القانونية معرفة ما إذا كان الاعتراف مؤقتاً أو محدداً ، قانونياً أو فعلياً . فكل

---

(١) فالاعتراف بالحكومة الجديدة الفعلية لا تبرره فقط الضرورات العملية وإنما ينبع من مبادئ القانون الدولي العام الأساسية :

"Is not only dictated by the practical necessities which do not permit interruption in international relations but it flows from the most essential principles of international law."

انظر فيليب مارشال براون ، مقالة الآثار القانونية للاعتراف ، المرجع السابق ص ٦٣٢ .

(٢) وإلا لوصل المجتمع الدولي إلى حالة يسميها Canning

"A total irresponsability of unrecognised governments".

انظر مقالة مارشال براون ، الاعتراف بالدول والحكومات الجديدة ، المرجع السابق ص ٦٩٣ . وقد أشار إلى حكم محكمة نيويورك .

The U.S. District Court of New-York

في قضية :

"Russian Government versus the Lehigh Valley Railroad Company",

والتي قررت فيه المحكمة :

"the importance of recognising governmental continuity, quite irrespective of considerations as to the existing form of a foreign government, or as to the human beings in control at any particular time, is well illustrated in this case".

هذه الحالات تفيد الاعتراف مهما حاولت الدولة أن تخفف أو أن تحد من آثاره[1]. والمهم هنا هو أن إرادةالدولة ذات السيادة قد وجدت من يعبر عن الإرادة الوطنية[2]. والاعتراف بالتالى ما هو إلا تنظيم وتصحيح وتوضيح لطبيعة ومدى العلاقات التى تربط بين الشعوب[3].

هذا ولا تجد حكومة الثورة التى تتولى الحكم فى دولة قديمة من ينازعها

---

(١) حاول وزير خارجية بريطانيا فى ٢١ مارس ١٩٥١ أن يفرق بين الاعتراف القانونى والفعلى بالحكومات فقال :

"The conditions under international law for the recognition of a new régime as the de facto government are that the new régime has in fact effective control over most of the State's territory and that this control seems likely to continue. The conditions for the recognition of a new régime as the de jure government of of a State are that the new régime should not merely have effective control over most of the State's territory, but that it should, in fact, be firmly established". 458, Hansard's Parl, Deb. Cols. 2410-2411 (Commons, 50th ser., 1950-1951).

ذكرها يحيى الجمل ، المرجع السابق ، ص ٣٣٠ .

"Dans le droit public international moderne, le concept de la légitimité a été remplacé par celui de l'effectivité du gouvernement à l'effet de subsister et d'accomplir comme tel les ordres de la nation et les devoirs de la vie commune internationale. Le gouvernement de facto est une autorité de fait qui émane expressément de la volonté nationale, quelle que soit la forme dans laquelle celle-ci se sera manifestée". Dr. Podesta Costa, la Reconnaissance d'un gouvernement de Facto par les Etats Etrangers, Rec. de droit international public, p. 22.

(٣) فالاعتراف – كما يقول فيليب مارشال براون .

"Recognition, therefore, ex necessitate juris is irrevocable in nature... The legal consequence of human relations must be permitted to have their free course, irrespective of changes in States and Governments."

مقالة الاعتراف بالدول والحكومات الجديدة السابق الإشارة إليها ص ٦٩٤ .

السلطة عادة إلا حكومة فى المنفى لا تملك القوة اللازمة أو الحق القانونى[1]. وهو ما يختلف عن الاعتراف بالدولة الجديدة حيث تواجه حكومتها حكومة دولة الأصل التى قد يكون لديها القوة التى تسمح لها بالدفاع عن حقوقها . وهو ما يدفع الدول إلى أن تكون أكثر حذراً وحيطة عند إعلان الاعتراف بالدول الجديدة . وهذا ما يفسر لنا قول البعض بأنه إذا كان الاعتراف بالدولة منشئاً فان الاعتراف بالحكومات الجديدة مقرر لوجودها[2].

وبناء على ما تقدم نستطيع أن نقرر الحقيقتين التاليتين :

١ ــ الاعتراف بالدولة هو اعتراف للجماعة السياسية المستقلة بالشخصية القانونية الدولية .

٢ ــ الاعتراف بالحكومة هو اعتراف بشخصية قانونية داخلية[3] يصبغ

---

(١) تنص المادة (٨) من الاتفاقية التى وافقت عليها اللجنة القانونية فى مؤتمر الدول الأمريكية السادس على ما يلى :

"Un gouvernement sera reconnu lorsqu'il remplira les conditions suivantes : 1. l'autorité effective avec des probabilités de stabilité et consolidation, et dont les édits, surtout en ce qui concerne les impôts et le service militaire sont acceptés par les habitants, 2. la capacité de faire face aux obligations internationales préexistantes, d'en contracter d'autres, et de respecter les principes établis de droit international."

انظر :

The Functions and differing legal character of treaties, by Arnold D. Mcnair, B.Y.B., 1930, p. 108.

وانظر أيضاً :

John B. Whitton, la Conférence Panaméricaine, Rev. G.D.I. P., 1929, p. 27.

(٢) "Recognition of a new State is therefore more constitutive and less merely declaratory than is the recognition of a new government."

انظر كوينسى رايت المرجع السابق ص ٣٢٥ .

(٣) رد الحكم – فى نزاع Tinoco بين بريطانيا وكوستاريكا عام ١٩٢٧ – على ادعاء

القانون الدولى عليها وصف الدولية ، ومثل هذا الاعتراف لا يقصد به أكثر من تمكين الدولة التى قامت بالاعتراف من الاستمرار فى علاقاتها مع الدولة التى تغيرت حكومتها .

رابعاً — الاعتراف الجماعى بالدول والحكومات الجديدة :

والاعتراف الجماعى قد يكون صريحاً وقد يكون ضمنياً .

والاعتراف الجماعى الصريح قد يصدر عن دولة واحدة — كاعتراف الولايات المتحدة بدول البلطيق عام ١٩٢٢ — وهو الاعتراف الجماعى من حيث الموضوع إذ يؤدى إلى الاعتراف بعدد كبير من الدول مرة واحدة . وقد يكون اعترافاً جماعياً صريحاً من حيث المصدر مثل اعتراف الدول الموقعة على معاهدة باريس سنة ١٨٥٦ بتركيا كدولة عضو فى الجماعة الدولية واعتراف مؤتمر سفراء الدول العظمى المنعقد سنة ١٩١٤ باستقلال ألبانيا .

حكومة كوستاريكا بأن حكومة تينوكو ليست حكومة قانونية أو فعلية طبقاً للقواعد الدولية لرفض عدد كبير من الدول الاعتراف بها :

"But it is urged that many leading powers refused to recognise the Tinoco government and that recognition by other nations is the chief and best evidence of the birth, existence, and continuity of succession of governments. Undoubtedly recognition by other Powers is an important evidential factor in establishing proof of the existence of a government in the Society of Nations ...The non-recognition by other nations of a government claiming to be a national personality is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such... Such non-recognition for any reason, however, cannot outweigh the evidence disclosed by this record before me as to the de facto character of Tinoco's government according to the Standard set by international law." Marvin Jones, The Retroactive Effect of the Recognition of States and Governments, B.Y.B., 1935, p. 152.

انظر أيضاً : A.J.I.L., Vol XVIII, p. 147.

ويتحقق الاعتراف الجماعي الضمني في صورة قبول الدول الجديدة في المنظمات الدولية . ودراسة مدى ارتباط الدول الأعضاء في منظمة دولية بالاعتراف بالدولة الجديدة التي قبلت عضويتها في المنظمة ترتبط إلى حد كبير بدراسة مدى تأثير عقد المعاهدات في الاعتراف بالدول . ونفرق هنا بين المعاهدات العقدية والمعاهدات الشارعة: فانشاء الالتزامات التعاقدية بين الدولة (ا) أو الدولة (ب) يصعب التوفيق بينه وبين عدم وجود الاعتراف المتبادل ، ويمكن لأطراف الاتفاق عند التعاقد ابداء التحفظات اللازمة الخاصة بعدم الاعتراف[1]. والقواعد القانونية الدولية تحكم العلاقات التي تقوم بينهم في هذه الحالة رغم عدم وجود التبادل الدبلوماسي ، ولا يوجد ما يمنعهم من إضافة أو تغيير هذه القواعد .

ويذهب جزء من الفقه إلى أن قبول الدول في المنظمات الدولية يرتب الاعتراف بالدولة الجديدة من جانب كل الدول الأعضاء ، واختلفوا فقط عند تحديدهم للآثار القانونية المترتبة على هذا الاعتراف وفي مدى التزام الدول الأعضاء بتبادل العلاقات الدبلوماسية مع الدولة الجديدة[2]. ونحن نؤيد الرأي الغالب في الفقه الذي يرفض ترتيب اعتراف الدولة العضو في منظمة بالدولة الجديدة كأثر لقبولها في عضوية المنظمة سواء منها الدول التي قامت

(١) أوضح هدسن عند توقيعه الاتفاقية الصحية الدولية في ٢١ يوليو ١٩٢٦ أن الولايات المتحدة لا ترمي بذلك إلى الاعتراف بأي حكومة لم تكن تعترف بها من قبل (روسيا) أو الارتباط بأي التزام تعاقدي في مواجهة دولة لها حكومة لم تعترف بها من قبل . ويرى Reglade التفرقة بين المعاهدة الشارعة والمعاهدة العقدية استناداً إلى إمكان انهاء الأولى باعلان منفرد في حين لا يجوز ذلك في المعاهدة الثانية : انظر :

Reglade, "de la nature juridique des traités internationaux et du sens de la distinction des traités-lois et des traités contrats", Rev. de droit public et de la science politique, XLI (1924), p. 505.

انظر أيضاً مقالة ماكنير السابق الإشارة إليها ص ١٠٨ .

(٢) انظر حافظ غانم المرجع السابق ٢٧٤ ، ويحيى الجمل المرجع السابق ص ٢٣٠ .

بالتصويت لصالح الدولة أو التى رفضت ذلك[1]. فالاعتراف يعبر عن رغبة الدولة فى إنشاء العلاقات الديبلوماسية مع الدولة الجديدة وهذا ما لا ترتبه بالضرورة العضوية المشتركة فى منظمة دولية . والأثر القانونى الوحيد لقبول عضوية الدولة الجديدة هو اعتراف المنظمة[2] بها فى نطاق السلطات التى تتمتع بها المنظمة ، وتمتعها بكافة حقوق العضوية وذلك عملا على تحقيق أغراض

---

(١) انظر فونسوا ، المرجع السابق ص ٧٣ ، وانظر أيضا :

Hans Aufricht, Principles and Practices of Recognition by International organisations, A.J.I.L. 1949, p. 679.

وقد أخذت عصبة الأمم بهذا الرأى وحين طلبت كولومبيا عضوية العصبة سنة ١٩٢٠ علقت ذلك على عدم اعترافها باستقلال بناما وهى إحدى الدول الموقعة على معاهدات فرساى ، وقرر مجلس العصبة :

"The Secretary General should be authorised to draft an acknowledgement of Colombia's proposal of accession without expressing any opinion on the point at issue".

كما رفض ، فى مؤتمر سان فرنسيسكو ، التعديل النرويجى الخاص باعطاء المنظمة الجديدة سلطة التوصية بالاعتراف الجماعى بالدول والحكومات الجديدة .

(٢) أقرت الأمم المتحدة أن الدولة التى تنفصل تصبح دولة جديدة ولا تلتزم بالمعاهدات التى عقدتها دولة الأصل وبالتالى فلا تصبح عضواً إلا باجراءات جديدة . وكان ذلك بمناسبة قبول عضوية الباكستان ، ولم تطلب الأمم المتحدة من مندوبى الهند (دولة الأصل) أوراق اعتماد جديدة على أساس أن الهند فى فبراير ١٩٤٨ هى نفسها الهند قبل التقسيم . وقد قدم السكرتير العام المساعد للشئون القانونية فى ٨ أغسطس ١٩٤٧ مذكرة بين فيها مدى تأثير تقسيم الهند على العضوية فى الأمم المتحدة قال فيها :

"This memorandum concludes that from the point of view of international law the situation is one in which a part of an existing state breaks off and becomes a new State, accordingly there is no change in the "international status of India". The territory which breaks off "will be a new State, it will not have the treaty rights of Old State, and it will not, of course, have membership in the United Nations."

انظر رولان ، المرجع السابق صفحة ٦٩٨ .

المنظمة . ولا يؤثر ذلك بحال فى العلاقات الفردية الموجودة بين العضو الجديد وبين سائر الأعضاء[1].

والاعتراف الجماعى بالحكومات الجديدة يسمح لأعضاء الجماعة الدولية بمعرفة الأوضاع الداخلية السائدة فى الدولة ومدى مشروعية وصول السلطة الحاكمة للحكم[2]. غير أن توصيات المنظمة الدولية فى هذه الحالة لا تلزم الدول الأعضاء بحال من الأحوال[3]. وقد قامت الجمعية العامة للأمم المتحدة عام

---

(١) قرر ممثل الولايات المتحدة فى مجلس الأمن عند بحث ما إذا كان قيام العلاقات الديبلوماسية بين بعض الدول الأعضاء فى الأمم المتحدة وبين الدول طالبة الانضمام — شرط ضرورى لقبول العضوية ما يلى : « أن قبول طلب العضوية فى الأمم المتحدة لا يتوقف البته على قيام العلاقات الديبلوماسية بين الدولة طالبة الانضمام وأعضاء الأمم المتحدة جميعاً ، أو بينها وبين دولة بالذات من أعضاء الأمم المتحدة . نعم أن قيام العلاقات الديبلوماسية يعد من أقوى الأدلة على ثبوت وصف الدولة فى المؤسسة طالبة الانضمام ، وعلى ثبوت قبولها من جانب الدول الأخرى فى عضوية العائلة الدولية ، ولكن ليس مفاد ذلك أن ميثاق الأمم المتحدة يخول العضو الحق فى أن يشترط لقبول انضمام دولة معينة أن تكون العلاقات الديبلوماسية قائمة بينها وبين دولته » . انظر محاضر مجلس الأمن السنة الأولى ، الحلقة الثانية ، الملحق رقم ٤ ص ٥٥ ذكرها حامد سلطان ، المرجع السابق ، ص ٨٧٠ .

قرر Jules Coucke فى تعليق له على مناقشات الجمعية العامة لعصبة الأمم بخصوص وضع ألبانيا

"On peut conclure implicitement de cette discussion que l'Assemblée n'entend pas faire dépendre l'admission d'une reconnaissance de jure préalable des Membres de la Société."

انظر :

"L'Admission dans la Société des Nations et Reconnaissance de Jure", Revue de droit international et de législation comparée, 1921, p. 321.

(٢) رولان ، المرجع السابق ص ٣٣٦ .

(٣) ويرى كونسى رايت أنه إذا كان مبدأ ستمسون يقضى بمنع الاعتراف بالدول الجديدة أو بالتغيرات الإقليمية الناتجة عن استخدام العنف فانه لا ينطبق على الحكومات الجديدة التى لا تأتى أثر تغيرات إقليمية كما أنه لا ينطبق على الاعتراف الجماعى . وهو يذهب إلى إعطاء الجماعة الدولية ككل الحق فى الاعتراف بالتغيرات الإقليمية بواسطة عمل جماعى مشترك . ويرى أن واجب عدم الاعتراف بنتائج العدوان التزام يقع على الدولة منفردة فى علاقاتها مع الدولة ضحية

١٩٤٦ باتخاذ إجراءات معينة ضد حكومة أسبانيا يمكن وصفها بأنها توصية جماعية صادرة عن الأمم المتحدة برفض الاعتراف بنظام معين : فقد أوصت الدول الأعضاء فى ١٢ ديسمبر من عام ١٩٤٦ بمنع حكومة فرانكو من عضوية المنظمات الدولية المرتبطة بالأمم المتحدة ومن حضور المؤتمرات التى قد تدعو إليها هذه المنظمات .

كما أوصت الجمعية العامة الدول الأعضاء بسحب ممثليها الديبلوماسيين من أسبانيا إلا إذا قامت فيها ، خلال فترة معقولة ، حكومة تستمد سلطتها من رضاء الشعب وتقدم الضمانات الكافية التى تكفل احترام النظم الديمقراطية والحرية السياسية[١]. وعادت الجمعية العامة وأكدت هذه التوصية فى ١٧ نوفمبر ١٩٤٧ . كما أصدرت فى ١٢ ديسمبر ١٩٤٨ توصية للدول الأعضاء بالاعتراف بحكومة كوريا بوصفها الحكومة الشرعية الوحيدة فى كوريا .

ومثل هذه التوصيات الجماعية بالاعتراف أو بعدم الاعتراف بالدول[٢]

العدوان ، أما الجماعة الدولية ككل فلا يوجد ما يمنعها من استعمال سلطاتها القانونية لتصحيح وضع قائم وترتيب ما تشاء من الآثار القانونية عليه . فالجماعة الدولية لها

Legislative authority to validate an accomplished fact... The principle ex injuria jus non oritur applies to individual recognition but the principle factis jus oritur applies to collective recognition".

ويجب أن تجد الجماعة الدولية الوسيلة لمطابقة القانون على الواقع ، فاذا كانت لا تستطيع تغيير الوقائع الموجودة فعليها أن تغير القانون والحقوق التى يرتبها لإعادة التوافق بين الواقع والقانون :

"The community of nations must eventually have a means of accommodating law to facts, and if it cannot or will not change the facts to vindicate the pre-existing law, it must change the law, or rights under it to reestablish the jural order in harmony with the facts."

المرجع السابق ص ٣٢٧ .

(١) انظر هانز أوفريشت ، المرجع السابق ص ٧٠٢ .

(٢) و ينتقد جزء من الفقه الحديث انفراد مجلس الأمن بسلطة التقرير عند قبول عضوية

والحكومات لا تؤثر فى السلطة التقديرية التى تتمتع بها الدول ذات السيادة فى

الدول الجديدة فى الأمم المتحدة . فالجمعية العامة ، طبقاً للميثاق ، لا تصدر توصية بالقبول ، إلا إذا قام المجلس باصدار توصية توافق عليها الدول الكبرى (المادة ٤) فاذا مارست إحدى هذه الدول حق الفيتو تعذر دخول الدولة فى المنظمة رغم مناصرة غالبية الدول الأعضاء لها . ويقرر Sottile أن السبب هو تفسير خاطئ لمعنى كلمة توصية التى يتضمنها نص المادة (٤) من الميثاق . والمادة (٢٧) من الميثاق التى قررت حق الفيتو ربطت بين سلطة استخدامه وبين المسائل السياسية الخاصة بحفظ السلم والأمن الدولى . وتؤكد المادة ٢٤ من الميثاق هذه الفكرة . وعملية قبول الدولة فى الأمم المتحدةلا علاقة لها بالمحافظة على السلم والأمن الدولىبل هى عمليةقانونية محضة . "loin d'être un acte politique, ce n'est qu'un acte essentiellement juridique".

والقول بالعكس يؤدى إلى الخلط بين الاعتبارات القانونية والاعتبارات السياسية كما يؤدى إلى تغيير معنى ومحتوى المواد ٤ ، ٢٤ ، ٢٧ من الميثاق . ويطالب Sottile فى النهاية باعطاء الجمعية العامة سلطة قبول الدول الجديدة استناداً إلى الاعتبارات الآتية :

١ – من الخطأ اعتبار التوصية الجماعية للدول الدائمة الشرط اللازم Sine qua non لقبول الدولة الجديدة . والزام الجمعية العامة بمراعاة هذه التوصية قول لا يتفق مع قيمة التوصية التى لا تتمتع إلا بقيمة أدبية لا تمنع الجمعية من حقها فى التقرير .

٢ – وحتى لو صدرت التوصية من مجلس الأمن فانها لا تلزم فى شىء الجمعية العامة التى لها فى النهاية السلطة فى إصدار توصية بأغلبية الثلثين بقبول العضو الجديد .

٣ – ومن جهة أخرى فإن توصية مجلس الأمن إما أن يكون لها القوة الملزمة وبالتالى لا معنى لإشتراط موافقة الجمعية العامة وإما ألا يكون لها هذه القوة ويكون للجمعية العامة فى هذه الحالة حرية قبول الدولة . وقواعد تفسير المعاهدات الجماعية « ومنها ميثاق الأمم المتحدة » تلزم الأخذ بالتفسير المناسب المعقول إذا أدى تطبيق النص إلى نتائج تتعارض مع أهداف ووظائف المنظمة . وبما أن هذه المعاهدات تتضمن شرط بقاء الشىء على حاله Rebus sic stantibus فالواجب اهمال بعض نصوصها إذا ما تغيرت الظروف التى عقدت المعاهدة فى ظلها .

انظر :

Antoine Sottile, Revue de droit international public 1956, p. 173.

ويضيف البعض إلى الحجج السابقة ما ورد فى الأعمال التحضيرية للميثاق . فقد قررت اللجنة الاستشارية القانونية ما يلى :

"The new text did not, in the view of the Advisory Committee of jurists, weaken the right of the Assembly to accept or

تقرير إنشاء العلاقات مع دولة أو حكومة جديدة . ذلك أن عملية الاعتراف ، كما سبق القول ، عملية حرة ، تختلط فيها الاعتبارات القانونية والسياسية وتمارسها الدولة وفقاً لمصالحها ورغباتها الخاصة .

تكلمنا فيما سبق عن الاعتراف الفردى والجماعى بالدول والحكومات الجديدة. وعرفنا أن الاعتراف بالدولة هو اعتراف بشخصية قانونية دولية وأن الاعتراف بالحكومة هو اعتراف بشخصية قانونية داخلية يسبغ القانون الدولى عليها وصف الدولية وأن الاعتراف أو عدم الاعتراف الجماعى لا يلزم الدول ذات السيادة التى لا تظل محتفظة بالحق المطلق فى تقرير الاعتراف بالدول أو الحكومات الجديدة . والآن ما هو الوضع القانونى للاعتراف بدولتى فيتنام الشمالية والجنوبية وبدولتى كوريا الشمالية والجنوبية ؟ وما أوجه الشبه أو الخلاف بين الاعتراف بهذه الدول وبين ما يدعو إليه الساسة الأمريكيون ومن ورائهم الفقه الأمريكى من وجود دولتين للصين : دولة الصين الشعبية ودولة فرموزا والبسكادوريز ؟

للإجابة عن هذه الأسئلة ، يلزم لنا دراسة الوضع التاريخى لهذه الدول حتى أواخر الحرب العالمية الثانية :

أولا — كوريا (١):

يرجع تاريخ كوريا إلى نحو عام ٢٤٠٠ قبل الميلاد عندما تولى تانجون

reject a recommendation for the admission of a new member, or a recommendation for the effect that a given State should not be admitted to the United Nations."

انظر :

Marie Suart Klooz, The rôle of the General Assembly of the United Nations in the Admission of members. A.J.I.L., 1949, p. 247.

(١) انظر :

Korean Hand book, Foreign languages publishing House,

الأب الأسطورى لكوريا قيادة قبائل كوريا الشمالية ومنشوريا لإنشاء أمة تسمى تشوسن . والمعتقد أن مملكة كوريا نشأت فى سنة ١١٢٢ قبل الميلاد . وقد شهد الكوريون دائماً الغزوات من جيرانهم الذين يفوقونهم فى القوة ، كما شهدوا بلادهم تمزقها المشاحنات والانقسامات الداخلية وعاشوا دائماً تحت حماية الأوصياء . ورغم ذلك فقد ظلت الثقافة الكورية سليمة لا تنقطع طوال التقسيمات السياسية والنفوذ الأجنبى سواء منه اليابانى والصينى والأمريكى والإنجليزى والألمانى . وخلال الحرب اليابانية الصينية سنة ١٨٩٤ وسنة ١٨٩٥ والروسية اليابانية ١٩٠٤ — ١٩٠٥ جعل اليابانيون من كوريا محمية يابانية . ورغم مقاومة الشعب ، استطاعت اليابان بمساعدة إنجلترا وأمريكا أن تعقد معاهدة ضم فى أغسطس ١٩١٠ جعلت من كوريا مستعمرة يابانية .

وفى تصريح القاهرة الصادر عام ١٩٤٣ وتصريح بوتسدام الصادر عام ١٩٤٥، وفى إعلان صدر فى ذات اليوم الذى دخلت فيه روسيا الحرب ضد اليابان (أغسطس ١٩٤٥) تعهد الحلفاء بضمان وتأكيد حرية كوريا واستقلالها . وعندما عرض اليابانيون استعدادهم للتسليم تقبلت القوات الروسية استسلام القوات اليابانية شمال خط عرض ٣٨ ونزل الأمريكيون فى جنوب كوريا فى سبتمبر ١٩٤٥ واتخذوا اجراء مماثلا جنوبى خط العرض المذكور واستولوا على أداة الحكم اليابانية وأقاموا حكومة عسكرية بها . وأثر ذلك تبادلت كل من روسيا والولايات المتحدة الاتهامات بالوقوف فى وجه كل جهد لإنشاء حكومة مؤقتة تمثل كوريا كلها. وأحيل الموضوع إلى الأمم المتحدة، التى دعت إلى إجراء انتخابات فى كوريا تحت مراقبة لجنة تتولى تأليفها الأمم

Pyongyang, 1959. Documents and Materials Exposing the Instigators of the Civil War in Korea, Ministry of Foreign Affairs of the Democratic People's Republic of Korea, Pyon-yang, 1950.

وأنظر أيضاً كوريا بعد عشر سنوات ٢٥ يونيو ١٩٥٠ ، ٢٥ يونيو ١٩٦٠ الحلقة ٥٥٤ من سلسلة مصر وأمريكا ، مكتب الاستعلامات الأمريكى ، القاهرة .

المتحدة . ونظراً للمعارضة التي قابلتها هذه اللجنة اتخذت الجمعية الصغيرة التي عقدت في فبراير ١٩٤٨ قراراً بانشاء حكومة مستقلة في كوريا الجنوبية والقيام بانتخابات في ١٠ مايو ١٩٤٨ . وقامت حكومة كوريا الشمالية ، هي الأخرى بالدعوة إلى انتخابات لتكوين الجمعية الشعبية العليا في ٢٥ أغسطس ١٩٤٨ . وأعلنت هذه الجمعية في أول اجتماع لها في سبتمبر ١٩٤٨ الدستور كما أعلنت الجمهورية الشعبية الكورية . ثم قامت الحرب الكورية وانتهت بعقد اتفاقية الهدنة في ٢٧ يوليو ١٩٥٣ . ولم يستطع مؤتمر جنيف المنعقد في إبريل ١٩٥٤ أن يصل إلى حل بخصوص الوحدة الكورية إذ طالب كل من الطرفين بتوحيد كوريا طبقاً لشروطه الخاصة . وأثر ذلك قامت الولايات المتحدة بعقد معاهدة دفاع مشترك مع كوريا الجنوبية كما قامت كوريا الشمالية بعقد مجموعة من الاتفاقات مع عدد من الدول منها الجمهورية العربية المتحدة .

من هذا العرض التاريخي السريع نصل إلى النتائج التالية :

١ — خضعت كوريا لصور الاستعمار المختلفة ، وآخرها الاستعمار اليابانى حتى سنة ١٩٤٥ ولم يعترف بها كدولة موحدة ذات سيادة على كل الإقليم في التاريخ الحديث .

٢ — نشأت كل من دولة كوريا الشمالية وكوريا الجنوبية على إقليم محدد ومارست حكومتاهما السيادة الفعلية والقانونية وتنظيما سياسياً معيناً على أفراد الشعب الموجودين على كل إقليم .

٣ — يترتب على ذلك نفى ادعاء تمثيل أى من الحكومتين للشعب الكورى كله وليس لأيهما أن تمارس السيادة إلا على الجزء من الإقليم الذى يخصها . وقرار حكومة الجمهورية العربية المتحدة بالاعتراف بالدولتين قرار قانونى سليم وليس لأيهما الحق القانونى فى الاحتجاج . ولا يمنع هذا من الاعتراف بهما كدولة واحدة إذا ما تمت الوحدة بينهما فيما بعد . وقرار الأمم المتحدة السابق الإشارة إليه لا يلزم فى شىء الدول الأعضاء فى الجماعة الدولية كما سبق لنا أن أوضحنا .

ثانياً – ڤيتنام :

اقتسمت إنجلترا وفرنسا وهولندا منطقة جنوبى شرقى آسيا لعدة قرون ، فاستولى الإنجليز على الهند وبورما والملايو ، واستولى الفرنسيون على الهند الصينية والهولنديون على أندونيسيا . ولم تهتم الولايات المتحدة بهذه المنطقة إلا فى أواخر القرن التاسع عشر خلال الحرب الأسبانية الأمريكية[1]. وقد أجبرت فرنسا فيتنام على توقيع معاهدة تجعل من أنام وتونكين محميات فرنسية وفقدت فيتنام استقلالها بذلك فى حوالى ٢٥ أغسطس ١٨٨٣ . ولم تنظر فرنسا لفيتنام خلال الحكم الفرنسى باعتبارها بلداً واحداً ، وإنما قسمتها إلى ثلاثة أقسام : « كوشين شينا » المستعمرة الفرنسية التى استولت عليها فرنسا عام ١٨٦٧ وأنام وتونكين المحميتان . وفى سنة ١٨٨٧ ضمت هذه المناطق الثلاث إلى كمبوديا وأصبحت تعرف فى ظل الاستعمار الفرنسى باسم اتحاد الهند الصينية

---

(١) "At that time President Mckinley confessed that he could not have told within a thousand miles where the Philippines were located. Interest in South East Asia grew with the automobile industry and insatiable demand for tires. Canning companies needed Southeast Asian tin. American dollars paid for much of the prewar wealth of the Indies—but too often the dollars continued in transit to European investors or imperial governments without bringing adequate development of reasonable happiness to neglected peoples of Southeast Asia... Their hopes—which had been stifled during the years of unequal competition against machines, the wealth, the institutions, and the might of the West—came to life in World War II. The prestige of the white man evaporated. The folly of the West was the opportunity of the East. The rallying cry became independence, no matter the cost, the objections, or the degree of unpreparedness".

انظر :

Claude A. Buss, Southeast Asia and the World Today, An Anvil Original, published by van Nostrand, 1958, p. 3-12.

الفرنسى الذى كان يحكمه حاكم عام مسئول مباشرة أمام وزير المستعمرات فى باريس . وفى سنة ١٨٩٣ انضمت للاتحاد المحمية لاوس وفى سنة ١٨٩٦ ضمت إليه كذلك مقاطعة كوانجشيوان . واضطرت فرنسا خلال الحرب العالمية الثانية إلى مهادنة اليابانين وتعاون الحاكم العام فى ظل حكومة بيتان مع اليابانين ليحافظ على السيادة الفرنسية . واعترف اليابانيون من جانبهم بمركز فرنسا فى فيتنام ولكنهم تظاهروا بمعاونة الفيتناميين ونادوا بمبدأ آسيا للأسيويين .

وفى ٩ مارس سنة ١٩٤٥ قام اليابانيون بالقبض على القوات الفرنسية وأعلن الباوداى Bao Dai إمبراطور أنام تحت حكم الفرنسيين استقلال ما سمى بعدئذ بفيتنام. وتبع ذلك إعلان ديجول عن نيته فى منح فيتنام الحكم الذاتى فى نطاق المجموعة الفرنسية . وفى بوتسدام ١٩٤٥ وضع الحلفاء خطة لتحرير فيتنام بواسطة الصينيين فى الشمال والإنجليز فى الجنوب حتى يعود الفرنسيون . إلا أن الفيت منه أنشأوا حكومة مؤقتة لفيتنام فى الشمال . وفى اللحظة التى زال فيها الاحتلال اليابانى تنازل الباوداى عن العرش وعن اختصاصاته للحكومة المؤقتة التى انتقلت إلى هانوى وأعلن استقلال فيتنام فى ٣ سبتمبر ١٩٤٥[1]. وقد قابل الفرنسيون مقاومة صغيرة عند الرجوع إلى

---

(١) "In a document more reminiscent of America than Russia, on September 2, 1945, Vietnam declared its independance".

انظر كلود بيوس ، المرجع السابق ص ٧١ وقد أبرز هذا الإعلان فى نهايته ما يلى :

For these reasons, we, members of the provisional government of Vietnam, declare to the World that Vietnam has the right to be free and independent, and has in fact become a free independent country". Government of Democratic Republic of Vietnam, Documents. Quoted in Allan B. Cole, Conflict in Indo-China and International Repercussions, A Documentary History, 1945-1955, Cornell University Press, 1956, pp. 19-21.

كمبوديا ولاوس ، أما فى فيتنام حيث تمكن هوشى منه من فرض نفوذه فقد اختلف الوضع . وفى ٢٨ فبراير ١٩٤٦ اتفق الفرنسيون وهوشى منه مع الصينيين على الانسحاب ، وعقد هوشى منه اتفاقية مع فرنسا فى ٦ مارس ١٩٤٦ اعترفت فيها الأخيرة بالحكم الذاتى لفيتنام فى نطاق المجموعة الفرنسية ولكنها لم تعترف بها كدولة مستقلة . ثم عقد مع الفرنسيين a modus vivendi فى سبتمبر ١٩٤٦ . ثم قامت الحرب بينهما ودفعت فرنسا الباوداى إلى إنشاء حكومة فى الجنوب فى ٣٠ ديسمبر ١٩٤٩ . وبذلك أصبح لفيتنام معنيان : فيتنام التى يحكمها هوشى منه أى الجمهورية الشعبية لفيتنام ، وفيتنام التى تحكمها الحكومة الجديدة فى سايجون والتى تؤيدها كل من فرنسا وإنجلترا وأمريكا . وعلى أثر قيام الحرب الكورية زادت مساعدات الولايات المتحدة لفيتنام الجنوبية[1]، وأحكم هوشى منه قبضته على فيتنام الشمالية . أما الباوداى فقد ترك مقاليد الحكم فى يد الطبقة المثقفة فرنسياً وترك الحرب للفرنسيين[2].

وفى عام ١٩٥٤ عقدت اتفاقيات جنيف الخاصة بوقف الأعمال العسكرية فى فيتنام.[3] ونظر أهل الهند الصينية إليها آملين أن تأتى بالحلول السليمة بعد أن

---

(١) "American influence in Policy grew with the expanding portion of bills paid by the United States".

انظر كلود بيوس ، المرجع السابق ص ٧٣ .

(٣) ويعلق كلود بيوس على ذلك قائلا :

"The Northern Vietnamese, henceforward called simply Viet-Minh, killed French officers faster than St. Cyr could graduate them. Supplies were exhausted faster than France and the United States could provide them. The bloody bath ended at Dien Bien Phu—and the Conference table at Geneva".

المرجع السابق ص ٧٣ .

(٣) تهدف اتفاقيات جنيف أساساً إلى تحقيق الغرضين التاليين :

١ – استقرار السلم ومنع الاستعداد لحروب جديدة فى منطقة جنوب شرق آسيا .

٢ – تسوية المشكلات السياسية فى فيتنام على أساس الاعتراف بالحقوق القومية للشعب الفيتنامى واستقلال وسيادة ووحدة وتكامل الأراضى الفيتنامية .

انتهت العمليات الحربية ، وأن تعترف بسيادتهم واستقلالهم وسيادتهم الإقليمية. ولكن مؤتمر جنيف قسم فيتنام بنفس الطريقة التى قسمت بها ألمانيا وكوريا ، وجعل خط عرض ١٧ الحد الفاصل بين فيتنام الشمالية وفيتنام الجنوبية كما ترك تقرير الوحدة الشاملة للانتخابات التى حدد لاجرائها صيف عام ١٩٥٦. وقد قبلت فرنسا وفيتنام الشمالية[1] هذه الاتفاقات ، غير أن فيتنام الجنوبية بايعاز من الولايات المتحدة رفضت التوقيع عليها كما رفضت الولايات المتحدة التوقيع عليها أيضاً . ومارست الولايات المتحدة الضغط على فرنسا حتى اعترفت باستقلال فيتنام الجنوبية فى ٢٦ أكتوبر سنة ١٩٥٥ .

ونخلص هنا أيضاً إلى نفس النتائج التى قررناها بالنسبة لدولتى كوريا . فلم يحدث أن قامت دولة مستقلة لفيتنام الموحدة ومارست سيادتها على الإقليم الفيتنامى كله فى التاريخ القريب . وقامت كل من فيتنام الشمالية والجنوبية على إقليم محدد أقرته اتفاقيات جنيف ، وبالتالى فليس لأى منهما أن تدعى السيادة على كل الإقليم. والاعتراف بهما كدولتين مستقلتين عمل قانونى سليم طبقاً للقواعد القانونية الدولية وهو لا يمنع الاعتراف بهما كدولة واحدة إذا ما تمت الوحدة بينهما .

إلا أنه لم يمض شهران على هذه الاتفاقيات حتى أقيم حلف جنوبى شرق آسيا ووضعت فيتنام تحت حمايته . وعدم استقرار الوضع حتى الآن فى هذه المنطقة يرجع إلى تدخل الولايات المتحدة التى عبر جون فوستر دالاس عن سياستها قائلا :

"The purpose of the State Department is to look out for the interests of the United States. Whether we make friends, I do not care".

(١) أعلنت فيتنام الشمالية عزمها مراراً على تحقيق الوحدة الفيتنامية وطالبت بتطبيق اتفاقيات جنيف وإجراء انتخابات حرة وبحرية إنشاء الأحزاب.وهى عروض رفضتها حكومة فيتنام الجنوبية :

"In foreign policy, the D R V regarded itself as a brother socialist nation and not as a sattelite. It accepted the general policies of Russia and China... Ho courted the recognition of Neutrals and boasted of his new understanding with Tito".

ثالثاً — الصين :

فى أواخر القرن التاسع عشر ، بدأت اليابان تتطلع إلى الأسواق والمواد الخام والامكانيات الواسعة الكامنة فى الصين ورأت أنها أحق بها من البرابرة الغربيين الذين استولوا على كل ثرواتها . وتقدمت بعدة مطالب خاصة فى كوريا ومنشوريا رفضتها الصين . فانقضت اليابان فى حرب سريعة وانتزعت كوريا وفرموزا وبورت آرثر وكل مفاتيح منشوريا ومداخلها الأستراتيجية . وتقدمت بريطانيا وفرنسا وروسيا القيصرية بانذار مشترك إلى اليابان طلبوا منها فيه الاكتفاء بكوريا وفورموزا والتخلى عن بورث آرثر ومنشوريا . ورأت اليابان خوفاً من تدخل الدول الغربية ، أن تقبل هذا الطلب . وقامت الدول الغربية أثر ذلك بتقسيم الصين إلى مناطق نفوذ جعلت من قوة الإمبراطورية الصينية فى أوائل القرن العشرين أضحوكة تتندر بها الدوائر الدبلوماسية الغربية فتقول « إن قوة الصين تعادل قوة الأسطول السويسري » .

وبدأت أمريكا — التى كانت منعزلة حتى ذلك الوقت — تتطلع هى الأخرى عبر الباسفيكى وتراه أصلح ما يكون ليكون بحيرة أمريكية تقع كاليفورنيا على ضفته الشرقية وسوق الصين العظيم على ضفته الغربية.ولتحقيق هذه الفكرة استولت على الفيلبين بعد حرب استعمارية مع أسبانيا ، وطالبت الدول الأربع الكبرى وقتها وهى بريطانيا وفرنسا وروسيا وألمانيا ألا يكون لتقسيم الصين أثر على حرية التجارة الخارجية وأن يؤخذ بسياسة الباب المفتوح أمام التجارة الأمريكية . وخلال الحرب العالمية الأولى فرضت اليابان حمايتها على الصين الشمالية وصرحت أمريكا فى ذلك الوقت : « أنه لا بد للصين من التساهل لأن الولايات المتحدة بصراحة ترى أن الجغرافيا تمنح اليابان علاقات من نوع معين مع الصين » . وأرغمت الدول الكبرى الصين على الاشتراك فى الحرب مقابل الوعد باشراكها فى مؤتمر الصلح . غير أنها لم تحافظ على وعدها ، فقد اعترفت الدول الكبرى فى مؤتمر الصلح فى فرساى بحق اليابان

فى وراثة ألمانيا فى الصين ، وبحق الدول فى العودة إلى مناطق نفوذها . بل وقامت أمريكا بالدعوة إلى عقد مؤتمر خاص فى واشنطن بين الدول ذات المصالح فى الصين والباسفيكى لتنسيق المصالح الغربية وموازنة القوى الاستعمارية فى الصين باسم ضمان وحدة الصين وضمان بقاء الباب مفتوحاً للجميع .[1] وظلت الصين مسرحاً للانقسامات الداخلية وضحية للأطماع الخارجية حتى الحرب العالمية الثانية التى اشتركت فيها إلى جانب الحلفاء الذين ضمنوا لها مقعداً دائماً فى مجلس الأمن . وقامت القوات الصينية — تطبيقاً لاعلان القاهرة الصادر عام ١٩٤٣[2] وتصريح بوتسدام الصادر فى عام ١٩٤٥ الذى قبلتـــه اليابان كأساس لتسليمها فى ١٤ أغسطس ســـنة ١٩٤٥ —[3] باحتلال جزر فرموزا والبسكادوريز .

وفى ٣٠ يونيو عام ١٩٤٧ قام الشيوعيون الصينيون بهجوم عام واحتلوا منشوريا وسيطروا على الجزء الأكبر من شمال الصين . وفى ديسمبر ١٩٤٨ حاصروا بكين التى استسلمت فى ٢٣ يونيو سنة ١٩٤٩ وأعلنت فى بكين الجمهورية الشعبية الصينية فى أول أكتوبر سنة ١٩٤٩ ، حين وقف ماوتسى تونج فى ميدان تين آن مين ليعلن قيام الجمهورية الشعبية وطرد الحكومة السابقة قائلا « والآن فليحذر أعداء الجمهورية داخل الصين وخارجها » . وسيطرت الحكومة الشيوعية الجديدة على كل أراضى الصين منذ نهاية عام ١٩٤٩ . وتشير الظواهر إلى زيادة فى الإنتاج الاقتصادى والتقدم الصحى

---

(١) انظر ماوتسى تونج — حياته وعصره بقلم روى ماك جريجور هاستى ترجمة حسين الحوت ، الدار القومية للطباعة والنشر .

(٢) وقرر فيه كل من روزفلت وتشرشل وشيانج كاى شيك :

"That all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores shall be restored to the Republic of China."

(٣) والذى ذكر فيه :

"that the terms of the Cairo Declaration shall be carried out".

والاستقرار السياسى والعسكرى . والمنطقة التى تسيطر عليها حكومة بكين تشمل كل أراضى الصين قبل الحرب العالمية الثانية مع استثناء بعض الجزر الصغيرة كجزر كيموى وماتسو وجزر فرموزا التى انسحبت إليها الحكومة القديمة برئاسة شيانج كاى شيك وأقامت بها بصفة دائمة . واستمرت الحكومة القديمة تشغل المقعد الدائم للصين فى مجلس الأمن مدعية أنها الحكومة الشرعية لدولة الصين . وبذلك أصبح فى الصين حكومتان : الحكومة الجديدة التى يرأسها ماوتسى تونج والحكومة القديمة برئاسة شيانج كاى شيك .

وتطالب حكومة الصين الشعبية بجزر فرموزا والبسكادوريز وبحق تمثيل الصين فى الجماعة الدولية استناداً إلى الاعتبارات التالية :

١ — تقوم الحكومة الجديدة فعلا بالسيطرة على كل إقليم الصين فى آسيا بمساحاته الشاسعة وما يقرب من سبعماية مليون نسمة ، وبالتالى فهى الحكومة التى تعبر عن إرادة شعب الصين رغم وجود الحكومة القديمة فى فرموزا .

٢ — القول بتطبيق مبدأ ستمسون وتوصية الجمعية التى أصدرتها فى فبراير ١٩٥٢ وطالبت فيها الدول الأعضاء باحترام استقلال الصين ومبادئ الأمم المتحدة والاتفاقات الدولية الخاصة بالصين وأعلنت فيها أن روسيا قد خالفت التزاماتها الدولية مع الصين بمساعدتها للشيوعيين ، قول يجافى الواقع والقانون . ومبدأ ستمسون يمنع الاعتراف بالتغيرات الإقليمية إذا نتجت أثر عدوان خارجى ، والحكومة الشيوعية حكومة جديدة قامت فى دولة قديمة والتغيير الذى تم فى الصين هو تغيير داخلى بحت لا يؤثر فى شخصية الدولة ولا فى عضويتها فى جماعة الدول إذ أن التغيرات الداخلية لا شأن لها بمركز الدولة الخارجى ، وإلا كان معنى هذا تدخل الدول فى الشئون الداخلية لدولة الصين .

٣ — الجزر التى تحتلها قوات الحكومة الوطنية بمساعدة الولايات المتحدة جزء من أراضى الصين اغتصبته منها اليابان وتعهدت بتسليمه إليها وقامت فعلا القوات الصينية باحتلالها عقب تسليم اليابان سنة ١٩٤٥ .

وتدعى حكومة الصين الوطنية أن النضال بينها وبين الحكومة الجديدة ما زال مستمراً وأنها ما تزال تتمتع بحق تمثيل الصين ما دامت تمارس سلطانها على جزء من أراضى الصين[1] وتسعى لاسترداد سلطانها على كافة أجزاء الإقليم . وتؤازر الولايات المتحدة الأمريكية حكومة الصين الوطنية ، بل ويدعى بعض الساسة الأمريكيون ووراءهم جزء من الفقه الأمريكى[2] وجود دولتين صينيتين : دولة الصين الشعبية ودولة فورموزا والبسكادوريز باعتبارها أقاليم جديدة لدولة جديدة . ويؤيدون هذا الادعاء بالأسباب التـــالية :

١ — استمرت جزر فورموزا والبسكادوريز بعد ضم اليابان لها عام ١٨٩٥ تكون جزءاً من الإمبراطورية اليابانية حتى تنازل اليابان عنها قانوناً عام ١٩٥١[3] فى معاهدة الصلح اليابانية . وتسليم اليابان عام ١٩٤٥ لم يتضمن التنازل النهائى عن هذه الأقاليم . والتنازل الصريح لم يظهر إلا فى معاهدات الصلح — التى لم توقع عليها حكومتى الصين — التى تمت فى سان فرنسيسكو سنة ١٩٥١ . أى بعد استيلاء الحكومة الشيوعية على مقاليد الحكم فى الصين .

٢ — رغم تنازل اليابان عن هذه الأقاليم فى معاهدة الصلح اليابانية إلا أنها لم تحدد المنتفع من هذا التنازل . وبالتالى فالدول التى وقعت على معاهدات الصلح ، وغالبيتها دول أعضاء فى الأمم المتحدة ، لها الحق فى التصرف فى هذه الجزر طبقاً لحق تقرير المصير .

وهذا الرأى يمكن توجيه النقد إليه من عدة زوايا :

١ — الادعاء بأن فرموزا والبسكادوريز لها وضع قانونى يختلف[4] عن

---

(١) انظر أبو هيف ، المرجع السابق ص ١٧٣ .

(٢) انظر كوينسى رايت ، المرجع السابق ص ٣٢٧ وما بعدها .

(٣) والتى ورد فيها أن اليابان تتنازل عن كل حقوقها فى هذه الجزر
"renounce all rights, titles and claims".

(٤) صرح دالاس فى اجتماع صحفى أثر عقد معاهدة الدفاع المشترك بين الولايات المتحدة

وضع دولة الأصل قول ينافى الواقع والقانون . وتصريح القاهرة وبوتسدام صريحان فى تنازل اليابان عن هذه الجزر لصالح دولة الصين وقد قامت القوات الصينية الممثلة فعلا لحكومة وشعب الصين باحتلال هذه الجزر عام ١٩٤٥ . وقلب نظام الحكم الداخلى وتقلد حكومة جديدة سلطة الحكم هو تغيير دستورى داخلى فى الهيئة التى تقوم بتمثيل الدولة فى المحيط الخارجى ، ولا يؤثر بتاتاً على حجم أو مساحة إقليم الدولة .

٢ – يبدو – للأسف – أن الفقه الأمريكى يخلط بين شخصية الدولة ذات السيادة وبين الحكومة التى تقوم بتمثيل هذه الدولة . ومعاهدة الصلح اليابانية وتصريح القاهرة وتصريح بوتسدام تقرر صراحة مبدأ ارجاع هذه الأراضى إلى جمهورية الصين . ومن المنطقى أن هذه الوثائق الدولية لم تقصد إلى منح شيانج كاى شيك هذه الأقاليم بصفته الشخصية وإنما بوصفه ممثلا ورئيساً لحكومة الصين وقتها . والقانون الدولى فعلا وعملا لا ينظر إلا إلى الواقع الداخلى وإلى من بيده السلطة الفعلية على إقليم الدولة ولكنه لا يعالج المذاهب الاقتصادية أو السياسية لحكومة ما إلا إذا أثرت هذه العناصر فى مدى مسئوليتها الدولية . والاستمرار فى رفض الاعتراف بحكومة دولة معينة نظراً لكراهية بعض الدول لنظام الحكم الداخلى فيها هو تدخل سافر فى شئونها الداخلية[1] ومخالفة للقواعد القانونية الدولية[2] .

وحكومة الصين الوطنية لضمان الدفاع عن فرمزا والبسكادوريز أن هذه الجزر لها :

"a different judicial status from the coastal inlands".

انظر كوينسى رايت ص ٣٣٣ .

(١) أو كما قال ايزنهاور نفسه فى ١٦ أبريل سنة ١٩٥٣ :

"Any nation's right to a form of government and an economic system of its own choosing is inalienable. Any nation's attempts to dictate to other nations their form of government is indefensible."

انظر رايت ، المرجع السابق ص ٣٣٥ .

(٢) "Whenever the requisite conditions of governmental

٣ ـ لا تملك الأمم المتحدة سلطة فصل إقليم معين من أقاليم دولة عضو وإقامة دولة جديدة عليه . وميثاق الأمم المتحدة صريح فى المحافظة على المساواة فى السيادة بين الدول الأعضاء وفى منع الهيئة من التدخل فى الشئون الداخلية للدول الأعضاء .

نخلص من كل ما تقدم إلى :

أولا : الاعتراف بدول فيتنام وكوريا سواء منها الشمالية أو الجنوبية اعتراف بدولة أى بشخصية قانونية دولية جديدة . والاعتراف بالصين الشعبية أو بالصين الوطنية اعتراف بحكومة أى بشخصية قانونية داخلية تقوم بتمثيل الدولة فى المحيط الدولى .

ثانياً : اطلاق لفظ الدول المقسمة بالتالى على كل من دولتى فيتنام ودولتى كوريا وصف يجافى الواقع إذ لم تظهر لأيهما فى المجتمع الدولى الحديث دولة ذات سيادة تمثل كل إقليم وشعب كل من الدولتين .

ثالثاً : القول بوجود دولتين للصين مخالفة صارخة للقواعد القانونية الدولية قصد بها البعض تحقيق بعض المصالح السياسية والاقتصادية لدولهم المعنية فى عدم الاعتراف بالحكومة الشرعية وهى حكومة الصين الشعبية .

---

capacity exist recognition is due as a matter of right. Once the revolutionary government may fairly be held to enjoy, with a reasonable prospect of permanency, the obedience of the mass of the population and once it is in effective control of the bulk of the national territory, it is entitled to recognition. Its revolutionary origin or the methods of the revolutionary change is irrelevant.

انظر ، لوترباخت ، خطاب لجريدة التيمس اللندنية ، ٦ يناير ١٩٥٠ .

وقد كتب جون فوستر دالاس فى كتابه War or Peace ما يلى :

"If the Communist government of China in fact proves its ability to govern China without serious domestic resistance, then it, too, should be admitted to the United Nations. However, a régime that claims to have become the Government of a country through civil war should not be recognised until it has been tested over a reasonable period of time".

انظر ص ١٩٠ .

دبلوماسية الجمهورية العربية المتحدة
فى افريقيا

أود أن أوضح ما أقصده من كلمة « دبلوماسية » التى ظهر استعمالها فى القرن السابع عشر وما استقر بعد مفهومها .

فقد عرفت بأنها إدارة العلاقاث الدولية بالمفاوضات والطريقة التى تباشر بها هذه العلاقات وتدار بواسطة السفراء والمفوضون .

وهى تستعمل أحياناً بمعنى السياسة الخارجية ، وأحياناً بمعنى القانون الدولى وأخيراً فى القرن التاسع عشر عرفها Calvo بأنها علم العلاقات التى توجد بين الدول والتى تنشأ من المصالح المتبادلة ومن مبادئ القانون الدولى العام ومن أحكام المعاهدات والاتفاقات وبالاختصار فهى علم العلاقات أو فن المفاوضات .

وما أقصده عند الكلام عن دبلوماسيتنا فى أفريقيا ، هو الكلام عن علاقاتنا الأفريقية ومعالم سياستنا وطريقها المرسوم الذى تسير عليه نتيجة لتجارب طويلة ولممارسة مبادئ موضوعة .

ألقيت بدار الجمعية المصرية للقانون الدولى فى ١٩ مارس سنة ١٩٦٤ .

وأنا فى هذا اقرأ من كتاب مفتوح واضح الخط سلس الأسلوب صادق التعبير فسياستنا واضحة كالشمس مستقيمة كالعود تسير من منبع الضمير والفكر الإنسانى إلى هدف محدد لا نرضى ولا نقبل دونه ممارسة أو مساومة .

وأفريقيا وحدة جغرافية وإنسانية مرت بمراحل وظروف شملت القارة جميعها فدراسة مسألتها سهلة ومركبة فى نفس الوقت ، ونحن فى أفريقيا تحكمنا وحدتنا مع القارة وظروفها التى يمكن القول بأنها تتمثل فى ثلاث مراحل :

المرحلة الأولى : قبل الاستعمار حيث كان النظام القبلى يسود شعوبها وكانت لكل مجموعة عاداتها ونظمها الاقتصادية ان صح ذلك وفلسفتها فى الحياة أى لها صورة من المدنية ولو أنها مهتزة إلا أنها أفريقية صميمة ومرت فى هذه المرحلة الجماعات الأفريقية بأزمات وصراع شأنها شأن أى جماعة إنسانية أخرى ، وكانت صلتها بخارج القارة ضئيلة .

وجاءت المرحلة الثانية : وهى تلك المرحلة التى ظهر فيها المكتشفون الأوروبيون ثم الارساليات الغربية ، ففى سنة ١٨١١ دخلت بعثة تبشيرية ومعها ثلاث مدرسين من سيراليونى وظلت إلى سنوات طويلة تتمتع بنفوذ قوى بعد أن تغلغلت فى نيجيريا وساحل الذهب وغرب أفريقيا ، كما وصلت أول بعثة ارسالية إلى ليبريا سنة ١٨٣٣ وفى سنة ١٨٧٩ وصلت بعثة من الآباء الكاثوليك إلى يوجندا من الجنوب ، وبدأ الاستعمار يرتبط بأفريقيا بصلات دينية وثقافية ثم سياسية وعسكرية وإدارية ، وقد أوقفت تلك الصلات سير الحياة الطبيعية الأصيلة فى القارة ، فربطتها بمدنيات خارجية أوروبية . وبعد أن كانت الجماعات مميزة باللغة وبالقبيلة والعقيدة صار التمييز على أساس الإقليم والحدود فبلغت أطوالها ٢٨,٠٠٠ ميل فى حين أن أطوال الحدود فى آسيا ، التى تكبر أفريقيا بمرة ونصف من حيث المساحة ، تبلغ ٢٦,٠٠٠ ميل فقط ، كما أن متوسط الحدود المشتركة للدولة الواحدة فى أفريقيا هو ٤ أو ٥ حدود . فلم تكن لتلك المميزات الطبيعية أى اعتبار فى نظر المستعمرين بل لعلهم

أرادوا بالتقسيم السياسى تمييع الكيان الأفريقى لضمان بقاء مناطق النفوذ التى وافق عليها مؤتمر برلين والتى ربطت المستعمرات اقتصادياً بالدول المستعمرة حسب قوة نفوذ كل منها واعتبرت أنها امتداد طبيعى للدولة الأم كما كانت تسمى والمزرعة الخصبة والبقرة الحلوب لشعوب الدول الأوربية » . وقسم كل إقليم من الناحية الإنسانية إلى مستعمرين يديرون أمور المستعمرة ومستوطنين أوربيين يستغلون الخبرات التى لا تدخل فى نطاق اقتصاد الدولة المستعمرة ثم الأهالى وهم الكائنات العاملة والتى ليس لها حق الحياة البشرية .

وكانت الدول الاستعمارية : إنجلترا — فرنسا — البرتغال — هولندا وبلجيكا وألمانيا وايطاليا . فى ذلك الوقت تكون القوة المحركة فى الأسرة الدولية ، وعملت على إيجاد قواعد فى القانون الدولى تبرر تصرفاتها وتجعل وجودها مشروعاً فى القارة وله سند من القانون ، ومن أمثلة النظريات القانونية التى حاول الاستعمار أن يثبتها فى القانون الدولى نظريات وحدة الأراضى والممتلكات والحدود التى تتسع حتى ما وراء البحار ، ونظريات الوصاية والانتداب والحماية . ووضع مقاييس كان هو الحكم فيها بنفسه ولنفسه لوصول الأقاليم إلى الأهلية الدولية الكاملة .

ومن أمثلة الوسائل المادية ليثبت بقائه ، ربط المواصلات بكافة أنواعها بشكل خاص يمنع الصلة بين شعوب القارة وبعضها إلا عن طريق عواصم الاستعمار ، وضرب حصاراً حولها فمنع عن العالم التعرف على داخل القارة الذى سماه بالمجاهل الأفريقية كما رسمت الخرائط على هذا الأساس .

ووضعت الكتب مستبعدة أى صلة لنا بالقارة ، وظل الاستعمار يستميت فى الحفاظ على مغانمه ، فما استقل شمال أفريقيا حتى ادعى بأن أفريقيا تبدأ من جنوب الصحراء وهذا ادعاء قائم للآن فى السياسة الخارجية للدول الغربية .

وكانت شعوب أفريقيا حتى الحرب العالمية الثانية بمنأى عن ولائم المستعمرين ، فلم تكن فى القارة سوى أربع دول مستقلة هى مصر وأثيوبيا

وليبريا وجنوب أفريقيا ، كانت مصر تحاول فى صوت خافت أن ترفع كلمة القارة إلى المجال الدولى ولكن هذا الصوت كان يشوبه عدم توافر الحرية والفعالية لأن الاستعمار عن طريق الاحتلال جثم على أنفاسها حقباً من الزمن وحاول أن يبعدها عن القارة بوسائله المختلفة .

ومن نتائج هذه المرحلة أن تطورت فى القارة مدنيات بشكل رأسى لا أفقى مما أدى إلى ما نشاهده اليوم من تباين فى الفكر والثقافة ومن معضلات اقتصادية وسياسية .

وجاءت المرحلة الحالية التى يمر فيها العالم والمجتمع الإنسانى بتطور جديد انطبع على قواعد القانون الدولى ، فهى مرحلة الأوضاع الجديدة Raurum Novarum التى ظهرت فيها قوى جديدة واندحرت قوى أخرى أو هى فى سبيل الزوال .

فقد وقعت خمسون دولة ميثاق سان فرنسيسكو فى ٢٦ يونيو سنة ١٩٤٥ ، ونعلم جميعاً نصيب الدول الأفريقية ، فقد كانت أصواتها لا تتعدى أربعة تستبعد منها جنوب أفريقيا فحكومتها لا تمثل الأفريقيين بأى حال ، وفى ظرف عشر سنوات ازداد العدد إلى ٦٠ ثم تمت المساومة المعروفة بال Bargain بدخول ١٦ دولة ، فأصبحت الأمم المتحدةبذلك تمثل العالم الذى تشكل أوروبا جزءاً منه بعد أن كانت عصبة الأمم تمثل أوروبا وضواحيها .

وكانت علاقة مصر بأفريقيا تنحصر فى الجارات المباشرة لها سواء التى تتقاسم معها الحدود أو التى تتقاسم معها مياه النيل إلى أن قامت ثورة ٢٣ يوليو سنة ١٩٥٢ وهذا التاريخ نعتبره بداية التأثير الأفريقى على التطورات المعاصرة فى القانون الدولى العام .

بدأت الثورة بمبادئها الست المعروفة وأولها التحرر من سيطرة الاستعمار . وسارت ثورتنا بخطى ثابتة فى هذا السبيل حتى تخلصت منه كلية ، وبدى صوتنا حراً فى المجال الدولى ، فانصرفنا بكل طاقاتنا إلى مساندة حركة تحرير

الشعوب الأفريقية وأوضح قائد الثورة دورنا فى أفريقيا بأن العالم لا يمكنه أن يتغاضى عن وجود قارة تسمى أفريقيا نحن قطعة منها ، وأن بلادنا تقع فى الشمال الشرقى من القارة ، وأن شعوب أفريقيا تنظر إلينا كحراس على أبوابها الشمالية ، فنحن نكون حلقة الصلة بينها وبين العالم الخارجى .ولا يمكننا والحال هذه أن نتخلى عن مسئولياتنا فى المساهمة بكل طاقاتنا فى نشر النور والعلم والمدنية إلى أعماق القارة .

هذه هى مبادئ الثورة وفلسفتها وهى نبراس واضح وصريح وعصب دبلوماسيتنا الأفريقية التى سرنا عليها بكل ما نملك من وسائل وامكانيات . ولم نترك مجالا فى الأوضاع الدولية الجديدة إلا ودعمنا فيه الوجود الأفريقى بما يؤدى إلى تحرر القارة كلية واثبات حق الإنسان الأفريقى .

الوضع قبل الحرب العالمية الثانية :

فى أعقاب الحرب العالمية الثانية لم يكن فى أفريقيا كما سبق أن قلنا — سوى أربع دول مستقلة — فى حين كانت بقية القارة ترزح تحت وطأة الاستعمار الغربى بمختلف أشكاله وأنواعه .

فالاستعمار البريطانى ، وكان يتميز بتثبيت هيبة الحكم وعدم اللجوء إلى القسوة والعنف إلا عند الضرورة ، واضفاء الطابع القانونى على الأنظمة الجائرة والمقيدة للحريات ، والسالبة لحقوق السكان .

والاستعمار الفرنسى الذى كان يقوم على دعائم عسكرية ويتسم بالعنف والشدة وقمع الحركات الوطنية ، بالبطش والوحشية ، وتجاهل الحقائق المحسوسة عن الوعى القومى فى تلك المستعمرات ، وبمحاولة طبعها بالطابع الفرنسى مع القضاء على كيانها الأفريقى .

والاستعمار البلجيكى الذى اعتمد على أن يقدم لأبناء الكونجو القدر اللازم لمعيشتهم فقط ، دون أن يهيئ لهم سبل التعليم أو الثقافة مع منعهم من ممارسة أى نوع من أنواع النشاط الذى قد يظهر أو يثبت كيانهم ، والاستعمار البرتغالى ،

المذبذب بين الاستغلال والاستيطان وبين التفرقة العنصرية والبرغلة والاندماج وبين النهوض بالأهالى وبين معاملتهم معاملة الرقيق .

كان هذا هو الوضع فى أفريقيا — وكانت الدول المستعمرة تأمل أن يستمر إلى أن جاءت الحرب العالمية الثانية .

ونظرة إلى الأسباب الحقيقية لهذه الحرب — التى تقابل فيها نوعان من الامبريالية :

الامبريالية التقليدية : والتى تمثلها بريطانيا وفرنسا والدول الاستعمارية الغربية ، والتى تعتمد فى اقتصادياتها بل وفى وجودها ذاته على ابقاء الرابطة بينها وبين مستعمراتها ، وبمعنى آخر بينها وبين مجالها الحيوى .

وامبريالية ناشئة : تتمثل فى ألمانيا النازية وايطاليا الفاشية — توصلت داخلياً إلى أقصى ما تسمح به امكانياتها الذاتية ، وتفرض عليها أطماعها القومية الانطلاق إلى مجالات جديدة .

أقول أن نظرة إلى الأسباب الحقيقية للحرب العالمية الثانية تبين أن الصراع الحتمى بين امبريالية تملك ، وأخرى لا بد لها من التملك ، كان هدفه ذلك المجال الحيوى الذى تعتمد عليه كل امبريالية ألا وهو المستعمرات .

دخلت الامبريالية التقليدية الحرب باسم الدفاع عن الحريات ومحاربة الطغيان فأعطت بذلك سنداً قوياً لأبناء المستعمرات لكى يطالبوا بدورهم بحرياتهم واستقلالهم وبانتهاء الحرب ومولد الأمم المتحدة التى تبنى ميثاقها مبادئ المساواة بين الشعوب وحقها فى تقرير مصيرها . أصبح لمطلب الشعوب المستعمرة فى الاستقلال سند دولى . وأدى استقلال الدول الآسيوية التى عانت هى الأخرى قروناً طويلة من نير الاستعمار إلى إيقاظ الشعوب الأفريقية المغلوبة على أمرها . كما كان لنضوج جيل جديد من المثقفين الأفريقيين عادوا إلى بلادهم يحملون أفكاراً راسخة عن حق كل شعب فى الاستقلال وفى حياة

أفضل ، فكان لهذا النضوج والتقدم الفكرى أثر بالغ فى التعجيل بنيل هذه الشعوب استقلالها .

وطفقت القارة الأفريقية فى تلك السنوات التى تلت الحرب العالمية الثانية تحاول أن تتلمس أشعة الأمل فى حاضر مضئ تتذوق فيه طعم الحرية وترفع عن كأهلها أثقال التخلف . وبدت القارة تتعرض لأحداث وتغيرات سياسة جسام .

ولكن نقطة التحول فى تاريخ أفريقيا الحديث ، وهى بلا شك انتصار مصر فى وقفتها ضد الاعتداء المسلح من الدول التى كانت تسمى بالدول العظمى سنة ١٩٥٦ ثم بعد ذلك اضطرت بريطانيا إلى منح غانا استقلالها نتيجة نمو الوعى الوطنى لدى الشعب الغانى ، وما بدا من مظاهر السخط الذى اتخذ صورة المظاهرات الشعبية والحملات المنظمة للمقاطعة السلبية .

عند هذه المرحلة شعرت فرنسا ، أكبر الدول الاستعمارية بحاجتها الماسة إلى إعادة النظر فى علاقاتها مع مستعمراتها ، فوضعت أسس سياسة خارجية جديدة دفعتها إليها اقتناعها بعدم جدوى الصورة القديمة للاستعمار وضرورة تطويرها بحيث تتفق والتطورات السياسية فى العالم . فوضعت مشروعاً لرابطة فرنسية تشمل كافة المستعمرات الفرنسية ، تتمتع فى ظله بلون من الاستقلال الذاتى مع استمرار ارتباطها بفرنسا . وخيرت المستعمرات الفرنسية فى أفريقيا بين قبول دستور الرابطة وبين استقلال هددت فرنسا من يختاره بقطع كل معونة عنه .

وانفردت غينيا بطلب الاستقلال وكان لموقفها وخروجها على الرابطة الفرنسية رد فعل كبير . فرحبت دول الكتلة الشرقية باستقلال غينيا وسارعت إلى الاعتراف بها وإنشاء سفارات لها فى كوناكرى . أما الدول الغربية فتلكأت فى الاعتراف بالدولة الجديدة وفى مد يد المعونة إليها لخشيتها من آثار تثبيت استقلال غينيا على باقى المستعمرات فى أفريقيا ، بينما رأت الدول

الأفريقية والآسيوية التى سبقت غينيا فى التخلص من الاستعمار أن مولد هذه الدولة ما هو إلا بداية لنهاية الاستعمار فى القارة الأفريقية .

لم يكن هناك بد بعد ذلك ، من أن تحنى الدول الاستعمارية رأسها لمنطق التطور الذى حتم عليها الاعتراف لمستعمراتها بالاستقلال .فكان عام ١٩٦٠ عام الاستقلال بالنسبة لأفريقيا ، إذ نالت استقلالها فيه خمسة عشر دولة هى :

مالى — السنجال — النيجر — الداهومى — ساحل العاج — فولتا العليا — أفريقيا الوسطى — التوجو — الكاميرون — الكنغو (ليوبولد فيل) — الكونغو (برازافيل) — تشاد — الجابون — مدغشقر — نيجيريا .

وسعت الدول الاستعمارية إلى استبدال استعمارها للدول الأفريقية برابطة تتخذ شكلا جديداً ، مستغلة فى ذلك حاجة تلك الدول إلى الخبرات فى مختلف الميادين ، وإلى رءوس الأموال اللازمة لتطوير اقتصادياتها ، ومستندة إلى طبقة من الأفريقيين نشأت عن احتكاكها بالمستعمر ، وتدين له بوجودها وبقائها .

استغلت الدول الاستعمارية كل هذه الظروف ، وعقدت معاهدات ووضعت أنظمة تضمن لها استمرار سيطرتها الفعلية على مستعمراتها السابقة ، وتحقق لها مغانم ثرواتها دون التعرض — بصفة مباشرة — لغضب هذه الشعوب وثوراتها للمطالبة بالاستقلال . هذا هو الاستعمار الجديد ، أو الـ Neo colonialism الذى اقتنعت الدول الاستعمارية بأنه الوسيلة المثلى لاستمرارها فى التمتع بخيرات القارة الأفريقية فى إطارات جديدة لا تخدش كبرياء الدول الحديثة الاستقلال ولا تعيقها — ظاهرياً — من التمتع بحرياتها .

وبالرغم من تعدد صور هذا الاستعمار الجديد ، فأن آثاره ونتائجه لم تتغير وهى استمرار الروابط الاقتصادية والسياسية والثقافية والعسكرية بين الدول الأوربية ومستعمراتها السابقة فى أفريقيا — وبعد تكتل بعض دول غرب أوربا داخل السوق الأوربية المشتركة تم وضع تنظيم خاص يربط الدول الأفريقية بالمنظمة الجديدة عن طريق اتفاقية انتساب تؤدى إلى نفس النتائج .

الاتجاه نحو الوحدة :

رأينا أن عدداً من الدول الأفريقية حصل على الاستقلال فجأة وتولى الأفريقيون زمام أمورهم بأنفسهم للمرة الأولى فى التاريخ الحديث ، وحمل ذلك البعض على الاعتقاد بأن الوحدة فيما بين هذه الدول قريبة وشيكة الوقوع بالنظر إلى العوامل العديدة التى تدفع نحو هذا الاتجاه . ويمكن أن نلخص تلك العوامل فيما يلى :

أولا : تشابه الظروف السياسية فى هذه الدول جميعاً سواء كانت واقعة تحت السيطرة البريطانية أم السيطرة الفرنسية ، فكلها كانت دولا مستعمرة يجمع بينها ماض من الدفاع المشترك ضد المستعمر .

ثانياً : تشابه الظروف الاقتصادية فيها ، فهى تشترك جميعها فى كونها حقلا للمواد الأولية اللازمة لصناعات الدول الغربية وسوقاً مفتوحة لمنتجاتها .

ثالثاً : ضعف الامكانيات الاقتصادية لهذه الدول منفردة ، وعدم تكامل كل منها اقتصادياً مما يحتم تنسيق جهودها حتى تتمكن من الوقوف موقف الند أمام الدول المتطورة ومن التغلب على ما تعانيه من تخلف اقتصادى .

وعلى الرغم من وجاهة هذه العوامل ، فأن العوائق التى اعترضت تحقيق الوحدة كانت أشد وأهمها :

أولا : حداثة عهد تلك الدول بالاستقلال ، وغيرة الحاكمين على سلطاتهم المكتسبة حديثاً .

ثانياً : عوامل الريبة والتخوف لدى بعض الزعماء الأفريقيين إزاء البعض الآخر منهم الذين نالوا قسطاً أكبر من الخبرة فى شئون الحكم والسياسة .

ثالثاً : تزكية الدول الاستعمارية للشكوك القائمة .

رابعاً : ربط الدول الاستعمارية اقتصـــاديات تلك الدول منفردة باقتصادها حتى تقضى على أية محاولة لتوحيد التخطيط الاقتصادى فيما بينها .

خامساً : ازكاء الدول الاستعمارية لعوامل التفرقة بسبب الدين أو بسبب الجنس وأبرز مثل لهذا محاولة تقسيم القارة إلى دول شمال الصحراء ودول جنوبها أو تقسيمها إلى دول ذات أغلبية مسلمة ودول ذات أغلبية مسيحية .

وكان أول المظاهر الإيجابية للاتجاه نحو وحدة أفريقية هو اتحاد غانا وغينيا عام ١٩٥٩ وكان هذا الاتحاد مرناً وغير مترابط نتيجة أسباب جغرافية واقتصادية إلا أنه — احقاقاً للحق — يعتبر أول خطوة فى سبيل الوحدة الأفريقية .

وتلعب هنا عوامل الريبة والشك دورها ، ويدعو الرئيس تابمان — رئيس جمهورية مونروفيا — كلا من الرئيسين نكروما وسيكوتورى إلى اجتماع فى سانيكيلى . وصدر بعد الاجتماع التصريح المعروف باسم هذه البلدة وتضمن مبادئ ستة لتكوين رابطة الدول الأفريقية المستقلة مستبعداً بذلك تعبير الاتحاد ولعل أهم المبادئ الست — هو المبدأ الثالث الذى ينص على أن أية دولة أو أى اتحاد عضو فى الرابطة — تحتفظ بشخصيتها وكيانها الدستورى ، ويضيف المبدأ أن تلك الرابطة قد تكونت من أجل تحقيق الوحدة بين الدول الأفريقية المستقلة ، ولا يقصد منها المساس بالسياسات الدولية الحالية والمستقبلة للدول الأعضاء فيها .

ويظهر جلياً أن تصريح سانيكيلى يعتبر حلقة هامة فى سلسلة تطورات الاتجاه نحو الوحدة — إذ أبرز الاتجاهين السائدين فى القارة . الأول ينادى بالسير قدماً نحو تحقيق الوحدة فى حين لا يرضى أصحاب الاتجاه الثانى سوى يسير حثيث نحوها بحيث يسبق تحقيقها خطوات متتالية قد تستغرق أجلا طويلا

ولأسباب كثيرة لا تحتاج إلى تعديد ، ولدت فى أفريقيا مجموعتان : الدار البيضاء ومونروفيا .

مجموعة الدار البيضاء :

عندما وجه الملك محمد الخامس الدعوة إلى عدد من رؤساء الدول الأفريقية للاجتماع فى الدار البيضاء فى يناير عام ١٩٦١ كان يأمل — هو والدول التى

قبلت الدعوة – أن يجتمع جميع رؤساء الدول الأفريقية لبحث مستقبل شعوب القارة الذين قاسوا طويلا من نير الاستعمار . وكان اجتماع الدار البيضاء يهدف إلى المساهمة فى عمل إيجابى من أجل حماية القارة من الأطماع الاستعمارية والمؤامرات التى تهدف إلى النيل من سيادة دولها .

لذلك نص ميثاق الدار البيضاء على ضرورة اتباع سياسة عدم الانحياز والتصميم على تحرير المستعمرات المتبقية فى أفريقيا . ولعل أهم قرار صدر عن اجتماع الدار البيضاء هو ذلك القرار الخاص بفلسطين والذى دمغ إسرائيل بأنها أداة من أدوات التسلل الاستعمارى إلى القارة من جديد .

وقامت فى وقت معاصر لمجموعة الدار البيضاء مجموعة أخرى ، أطلقت على نفسها اسم مجموعة برازافيل . ولم تضع لنفسها – بخلاف مجموعة الدار البيضاء . سياسة مرسومة طويلة المدى إنما قصرت نشاطها فى بادئ الأمر على التوسط بين فرنسا والجزائر . ثم تطور بها الأمر إلى أن أصبحت العلاقة بين الدول الأعضاء فيها – وجلها من المستعمرات الفرنسية السابقة – علاقة أكثر دواماً .

وثمة نقطة خلاف جوهرى بين المجموعتين المشار إليهما . فبينما مجموعة الدار البيضاء مفتوحة لجميع الدول الأفريقية المستقلة حيث توجه الفقرة الثانية من ميثاقها « النداء » إلى كافة الدول الأفريقية المستقلة لمشاركتها فى تدعيم الحرية لأفريقيا وبناء صرح وحدتها وسلامة أمنها نجد أن مجموعة برازافيل مجموعة مغلقة ، قاصرة على أعضائها . فهى إذن محاولة عمدية لخلق التكتلات فى أفريقيا .

وأراد عدد من الدول الأفريقية – الخارجة عن نطاق المجموعتين القائمتين – أن يكون لها دور إيجابى فى مقدرات القارة ، فتبنى عدد من الزعماء الأفريقيين الدعوة إلى عقد مؤتمر للقمة يعقد فى مونروفيا ، ويضم أكبر عدد من الدول الأفريقية لوضع أساس التعاون بينها ولتقوية جبهتها تجاه دول الدار البيضاء . ومن هذا الاجتماع ظهرت مجموعة عرفت باسم مجموعة « مونروفيا »

مؤتمر القمة الأفريقى ومنظمة الوحدة الأفريقية :

سبق أن قلنا أن مؤتمر الدار البيضاء كان يهدف إلى الجمع بين الدول الأفريقية المستقلة كلها . وبالرغم من نشوء مجموعات أفريقية أخرى فان الحاجة إلى التقارب وشعور الزعماء الأفريقيين بضرورة التعاون فيما بينهم جعلت فكرة اجتماعهم حاضرة فى أذهانهم تنتظر الوقت المناسب للظهور إلى حيز التنفيذ .

وعلى الرغم من المحاولات العديدة التى بذلها الاستعمار وأذياله فى بث التفرقة بين الدول الأفريقية فقد اتفقت هذه جميعها على الاجتماع على مستوى رؤساء دولها وحكوماتها فى مؤتمر تاريخى دعا إليه الإمبراطور هيلاسيلاسى فى أديس أبابا .

ويعتبر مؤتمر أديس أبابا — بحق — نقطة تحول فى تاريخ القارة إذ أسفر عن توقيع ميثاق لمنظمة الوحدة الأفريقية يهدف إلى :

١ — تنمية وحدة الدول الأفريقية .

٢ — تنسيق وتقوية تعاونها وجهودها لتحقيق حياة أفضل لشعوب أفريقيا

٣ — الدفاع عن سيادتها وسلامة أراضيها واستقلالها .

٤ — القضاء على الاستعمار بجميع صوره فى القارة الأفريقية .

٥ — تشجيع التعاون الدولى مع الأخذ فى الاعتبار ميثاق الأمم المتحدة والاعلان العالمى لحقوق الإنسان .

ويستند ميثاق المنظمة إلى المبادئ التالية :

١ — المساواة فى السيادة بين جميع الدول الأعضاء .

٢ — عدم التدخل فى الشئون الداخلية للدول الأعضاء .

٣ — احترام سيادة كل دولة وسلامة أراضيها وحقها الثابت فى كيانها المستقـــل .

٤ – التسوية السامية للمنازعات عن طريق التفاوض والوساطة والتوفيق والتحكيم .

٥ – الاستنكار الكامل لأعمال الاغتيال السياسى فى جميع صوره ، وكذلك ألوان النشاط الهدام التى تقوم بها الدول المجاورة أو أية دولة أخرى .

٦ – التفانى المطلق لقضية التحرر التام للأراضى الأفريقية التى لم تستقل بعد

٧ – اتباع سياسة عدم الانحياز تجاه جميع الكتل .

دبلوماسية الجمهورية العربية المتحدة فى أفريقيا :

كانت صلة الجمهورية العربية المتحدة (مصر) حتى وقت قريب بالقارة التى هى جزء منها تنحصر فى علاقات ثنائية مع كل من السودان وأثيوبيا ، ولست فى حاجة إلى أن أبرز الأسباب التى كانت تكمن وراء هذه العلاقات فروابطنا مع السودان لا تخفى على أحد وصلة الكنيسة الأثيوبية بالكنيسة المصرية قديمة ومعروفة ، وفيما عدا هاتين الدولتين كانت القارة الأفريقية مغلقة فى وجهنا ، بل كانت بالنسبة لنا عالماً مجهولا ، وقد ساهمت عوامل كثيرة فى ذلك منها أنه لم يكن لمصر سياسة خارجية مستقلة مرسومة ، وأن معظم الشعوب الأفريقية كانت لا تزال واقعة تحت سيطرة الاستعمار .

وفى عام ١٩٥٥ عقد مؤتمر باندونج ، ودعيت إليه الدول الأفريقية والآسيوية المستقلة وكان الباعث إلى الدعوة إليه إيجاد الصلة بين الدول الأفريقية والآسيوية ، وهى فى واقع الأمر دول تشابهت ظروفها فى خضوعها للاستعمار لسنوات طويلة وضعف فى امكانياتها الاقتصادية .

وقد هدف المؤتمر إلى تنسيق جهود هذه الدول النامية والاتفاق على سياسة مشتركة تحقق للدول أفضل الظروف لكى تسير فى تطورها السياسى والاقتصادى خطوات واسعة حتى تلحق بتلك الدول التى سبقتها فى هذا المجال

ويعتبر هذا المؤتمر نقطة تحول كبرى فى علاقاتنا الدولية إذ لعبت فيه

الجمهورية العربية المتحدة وقتئذ دوراً إيجابياً هاماً لا سيما فى تقرير سياسة عدم الانحياز وفى رسم خطة لمعاونة الحركات التحررية فى الأقاليم التى كانت خاضعة للاستعمار .

وقبل أن أسترسل فى الحديث عن الدور الذى قامت به الجمهورية العربية المتحدة فى القارة الأفريقية فى السنوات الأخيرة يهمنى أن أذكر باختصار أهداف سياستها فى المرحلة الحالية ، وهى تتلخص فى :

أولا : القضاء على السيطرة الاستعمارية والاستغلال الاقتصادى ويدخل تحت هذا البند محاربة التفرقة العنصرية .

— محاربة الاستعمار البرتغالى .

— معاونة الحركات التحررية فى تلك الأقاليم التى لم تنل استقلالها بعد .

ثانياً : تجميد النشاط الإسرائيلى فى القارة باعتباره وجهاً من أوجه الاستعمار الجديد .

ثالثاً : تأمين منابع نهر النيل وضمان استغلال عادل مشترك لمياهه .

رابعاً : تنشيط العلاقات التجارية بين الجمهورية العربية المتحدة وبين الدول الأفريقية .

وهناك عدة عوامل ساعدت على نجاح دبلوماسيتنا فى القارة الأفريقية منها :

١ — موقف الجمهورية الحيادى الواضح وشخصيتها الدولية ومركزها كدولة أفريقية كبرى تحرس الباب الشمالى الشرقى للقارة .

٢ — مساهمة الجمهورية الفعالة وجهودها الدائبة لتحرير القارة الأفريقية ودعم استقلال دولها مما أكسبها سمعة طيبة بين دول القارة وشعوبها .

٣ — وجود دول متحررة لها شخصيتها المستقلة مما سهل التنسيق بين وجهات النظر فى المجالات الدولية والأفريقية .

٤ — قيام تعاون وتضامن وثيق بين الجمهورية وبين الدول المتحررة بعد اشتداد النشاط الاستعمارى فى أفريقيا .

٥ – امكانيات الجمهورية فى تقديم القروض والمعونات المختلفة للدول الأفريقية وما لذلك من آثار مادية ونفسية على هذه الدول وغيرها من الدول المجاورة لها .

٦ – وجود روابط روحية ودينية وتاريخية مع الكثير من دول القارة وتشوق الأهالى المسلمين إلى تعلم اللغة العربية والنظر إلى القاهرة والأزهر كمركز اشعاع للدين الإسلامى يفتح المجال أمام الجمهورية لتوطيد علاقاتها الثقافية والدينية بالقارة .

٧ – تحمس الشعوب الأفريقية لمبدأ الوحدة الأفريقية والتضامن الأفريقى واعتناق كثير من الزعماء لهذه المبادئ .

٨ – اتجاه أغلب دول القارة إلى النظم الاشتراكية مما ييسر للجمهورية التفاهم معها وتقديم خبراتها ومساعدتها فى هذا المجال .

٩ – الصراع بين الكتلتين العالميتين على توطيد نفوذهما فى القارة يساعد القوى التحررية فى هذه الدول .

١٠ – تعارض مصالح الدول الاستعمارية فيما بينها والخوف من أطماع الولايات المتحدة فى وراثة النفوذين البريطانى والفرنسى .

* * *

إلا أن هناك عوامل أخرى تقف فى سبيل نشاط الجمهورية يمكن أن نجملها فيما يلى :

١ – النفوذ الأجنبى فى القارة – فالتيارات الأجنبية لا تتوانى عن محاربة كل تقارب يمكن أن يتم بيننا وبين دول القارة ، خاصة وأن التقارب سيؤدى بطبيعة الحال إلى تقلص النفوذ الأجنبى وسيطرته .

٢ – رواسب الدعاية المغرضة ضد الجمهورية العربية المتحدة الممثلة فى اتهام العرب بأنهم أول من احتكر تجارة العبيد واتهام الجمهورية كذباً بمحاولة السيطرة على القارة وبالأغراض والنوايا التوسعية وباستغلال الدين لأغراض سياسية ومما ساعد على ترسيب هذه الدعايات فى أذهان بعض الزعماء انقطاع

الصلة بينهم وبين الجمهورية قبل الاستقلال والعزلة التى فرضها عليهم الاستعمار طوال العهود الماضية .

٣ ــ قلة وصعوبة المواصلات ، ومن المعروف أن الاستعمار عمد إلى ابقاء القارة فى حالة تأخر شديد من جميع النواحى وخاصة فيما يتعلق بالمواصلات الداخلية والخارجية ، هذا بالإضافة إلى أن الدول الاستعمارية كانت تهدف إلى ربط مستعمراتها بعواصمها .

وتنفيذاً للأهداف التى سبق ذكرها لم تتردد الجمهورية العربية المتحدة فى الاعتراف بالدول الأفريقية فور حصولها على الاستقلال وعملت على تبادل التمثيل الدبلوماسى معها زيادة فى توثيق العلاقات .

كما أنها قدمت وما زالت تقدم يد العون للحركات التحررية الوطنية فى المستعمرات البرتغالية وليس أدل على هذا من اعترافنا بحكومة أنجولا فى المنفى . ولم تتوانى الجمهورية العربية المتحدة عن قطع علاقاتها الدبلوماسية بكل من البرتغال وجنوب أفريقيا تنفيذاً لقرارات الأمم المتحدة ومؤتمر القمة فى أديس أبابا ، هذا وتقوم الجمهورية العربية المتحدة بخطوات إيجابية شتى يمكن تعدادها فيما يلى :

١ ــ توقيع اتفاقات للتجارة والدفع مع غالبية الدول الأفريقية اسهاماً فى زيادة حجم التبادل التجارى معها وتفادياً للصعوبات التى يمكن أن تنشأ عن قلة حصيلة العملة الصعبة لدى الدول الأفريقية .

٢ ــ تقديم المعونة الاقتصادية والقروض لعدد من الدول الأفريقية مساهمة منا فى برامج التنمية لهذه الدول .

٣ ــ توقيع اتفاقات ثقافية وبرامج تنفيذية لها تسمح بارسال مدرسين عرب فى بعض الدول الأفريقية ، وادراج عدد كبير من الطلبة الأفريقيين فى الجامعات والمعاهد الدراسية العربية .

٤ ــ إنشاء خطوط جوية وبحرية لربط أجزاء القارة بعضها ببعض كسراً للعزلة التى فرضتها الدول الاستعمارية على هذه المستعمرات طوال القرون الماضية

٥ – الاشتراك فى كافة المؤتمرات الأفريقية سواء كانت على مستوى الحكومات أو على مستوى الشعوب وتسعى الجمهورية من وراء ذلك إلى :

(أ) توثيق العلاقات مع المسئولين فى هذه الدول وإيجاد الصلات الشخصية بين ممثلى الجمهورية وممثلى باقى الدول الأفريقية .

(ب) الدعوة لسياسة عدم الانحياز باعتبارها السياسة الوحيدة الكفيلة بابعاد القارة الأفريقية عن مجال الحرب الباردة .

(ج) ابراز الدور الخطير الذى تلعبه إسرائيل كأداة من أدوات الاستعمار فى القارة واقناع الدول الأفريقية بالنتائج الضارة التى تنجم عن فتح الباب للتغلغل الإسرائيلى .

* * *

وما دمنا بصدد الكلام عن الدور القيادى الذى تقوم به الجمهورية فى أفريقيا فلن يكتمل الحديث إلا باشارة إلى النشاط الملحوظ للجمهورية كعضو فى المجموعة الأفريقية فى الأمم المتحدة تجاه القضايا التى تمس مستقبل القارة . فما من قرار مقدم إلا وكانت الجمهورية العربية المتحدة أول مؤيديه ان لم يكن من مقدميه ، والأمثلة كثيرة على ذلك :

– فقد تبنت الجمهورية القرارات الخاصة بتصفية الاستعمار بصفة عامة – والقرارات المتعلقة بالمستعمرات البرتغالية فى أفريقيا .

– القرارات الخاصة بالتفرقة العنصرية – وبزيادة تمثيل الدول الأفريقية فى أجهزة الأمم المتحدة .

* * *

وختاماً . . فان الجمهورية العربية المتحدة كما تلحظون تعلق أهمية كبرى على مستقبل وأمن القارة الأفريقية ، وتسعى جاهدة لكى تتبوء الدول الأفريقية مركزها اللائق بها فى المجالات الدولية نظراً لاقتناعها بأن مركز الثقل

فى العالم وفى المنظمات الدولية انتقل فى السنوات القليلة الماضية إلى الدول الأفريقية .

وعلى الرغم من الصعوبات التى تعترض سبيل أفريقيا ، فان الجمهورية العربية المتحدة لواثقة من أن عوامل الفرقة ستحل نفسها بنفسها وستبقى عوامل الوحدة هى السائدة وستخرج أفريقيا من معاركها مع الاستعمار واتباعه قارة موحدة تلعب دورها المنوط بها فى المحافظة على السلام والأمن الدوليين وفى أبعاد شبح الحرب عن البشرية جمعاء .

ونحو هذا المستقبل الزاهر يجب أن تخطو الخطوة الأولى فى ذلك السبيل ، وعماد هذا المستقبل هى كلمة بل عبارة تحوى فى طياتها بذور التقدم والازدهار وأسس التطور والاستقلال « أفريقيا للأفريقيين » .

جمال نجيب

المحكمة الأوروبية لحقوق الانسان

دراسة فى ضمانات الحقوق وتطور مركز الفرد

على الصعيد الدولى (*)

بقـلم

الدكتور عز الدين فوده

خطة البحث :

* مقدمة .
* الاتفاقية الأوروبية لحماية حقوق الإنسان والحريات الأساسية .
* نطاق تطبيق الاتفاقية الأوروبية .
* تنفيذ الاتفاقية الأوروبية على الصعيد الوطنى .
* دور اللجنة الأوروبية لحقوق الإنسان فى تحقيق الحماية الدولية لتنفيذ الاتفاقية .
* تشكيل المحكمة الأوروبية لحقوق الانسان .
* اختصاص المحكمة الأوروبية لحقوق الإنسان بالرقابة القضائية على تنفيذ الاتفاقية وحماية الحقوق والحريات .
* نشاط المحكمة الأوروبية لحقوق الإنسان : سير الإجراءات وصدور الأحكام .
* أهمية المحكمة من حيث مركز الفرد .

(*) موضوع المحاضرة التى ألقيت بدار الجمعية المصرية للقانون الدولى يوم ٢٦ مارس سنة ١٩٦٤ .

مقدمة :

منذ أربعة عشر عاماً مضت ، وعلى وجه التحديد فى ٤ نوفمبر سنة ١٩٥٠ وقعت فى روما خمسة عشر دولة من الدول الأعضاء بمجلس أوروبا الاتفاقية الأوروبية لحقوق الإنسان ، ولم يكن قد مضى على انتهاء أقسى حرب شهدتها البشرية وانهيار أكثر النظم بربرية وأهداراً لحقوق الإنسان وحرياته الأساسية سوى خمس سنوات .

ومن قبل صدر فى سان فرنسسكو سنة ١٩٤٥ ميثاق الأمم المتحدة ، يفرض التزاماً قانونياً على الدول الأعضاء فى أكثر من سبع مواضع فيه بوجوب احترام حقوق الإنسان وحرياته . غير أن الميثاق لم يفصل فى مضمون هذه الحقوق وتحديد ماهيتها ، أو يوجد طريقاً قانونياً لحمايتها وضمان تنفيذ الالتزام الواقع فى كنف الدول برعايتها . وعندما صدر الإعلان العالمى لحقوق الإنسان فى ١٠ ديسمبر سنة ١٩٤٨ ليحدد ويوضح مضمون حقوق الإنسان وحرياته الأساسية التى كافحت الإنسانية من أجل الوصول إلى استكمالها أجيالا طويلة ، فى شقيها السياسى والاجتماعى الاقتصادى ، لم يعدُ هذا الإعلان العالمى أن يكون وثيقة تعليمية شارحة لماهية هذه الحقوق والحريات ، صدرت عن الجمعية العامة للأمم المتحدة فى شكل توصية لا تحمل معنى الالزام قانوناً لتنفيذ ما تضمنته من مبادئ أو حقوق يلزم رعايتها من قبل الدول أعضاء الأمم المتحدة ، وإن كان لها صدى الاستجابة الأدبية للضمير العالمى والرأي العام العالمى فى أعقاب الحرب الكونية الثانية ونفوذ المنظمة الدولية التى صدرت عنها وتأثيرها السياسى [1] . ومن سوء الحظ أنه على الرغم من مرور هذه السنين الطويلة على صدور هذا الاعلان ما زالت لجنة حقوق الإنسان والمجلس الاقتصادى والاجتماعى بالأمم المتحدة فى سبيل وضع ميثاقين

---

(١) انظر فى تفصيل ذلك بحثنا « الضمانات الدولية لحقوق الإنسان » ، المجلة المصرية للقانون الدولى ، المجلد العشرون ، سنة ١٩٦٤ .

فى صورة اتفاقية دولية ملزمة بشأن حقوق الإنسان ، أحدهما خاص بالحقوق المدنية والسياسية والآخر يتصل بالحقوق الاقتصادية والاجتماعية والثقافية . والأمل ضعيف أن نصل فى وقت قريب إلى إقرار هذين الميثاقين من قبل دول متنازعة وفى عالم منقسم . فمن ناحية يختلف مفهوم الحرية والديمقراطية والحقوق لدى كل من الديمقراطية الغربية والديمقراطية الشيوعية ، وحيثما يدافع كل منهما عن حقوق الفرد فأنه يحدد تطبيقاً مختلفاً لهذه الحقوق والحريات التى يكون اهدارها داعياً إلى الشكوى من الحكومة المتعاقدة . ومن ناحية أخرى يصعب الاتفاق حول مضمون هذه الحقوق والحريات فى عالم منقسم إلى بلاد متخلفة وأخرى متقدمة تتفاوت فى أوضاعها الاقتصادية والاجتماعية والثقافية[1]. وهناك قبل كل شىء الاختلاف حول الوسائل والإجراءات الصحيحة اللازم اتباعها لتنفيذ الميثاقين عندالانتهاء من إصدارهما والتصديق عليهما . فاجراءات التنفيذ المنصوص عليها لميثاق الحقوق السياسية والمدنية تختلف اختلافاً كبيراً عن إجراءات تنفيذ ميثاق الحقوق الاقتصادية والاجتماعية والثقافية ، نظراً للاختلاف الكبير بين ما يرتبه الميثاقان من مسئوليات تلتزم بها الدول الموقعة عليهما . فميثاق الحقوق المدنية والسياسية يقترح إنشاء لجنة من تسعة أشخاص تقوم بمهمة التوفيق وإيجاد الحلول إذا ما لجأت إليها الدول أطراف الميثاق بشأن منازعة بينها حول تطبيق نصوصه ، وإلا كان لهذه الدول فى النهاية حق الالتجاء إلى محكمة العدل الدولية بعد أن تصدر لجنة حقوق الإنسان تقريراً فى هذا الخصوص . أما ميثاق الحقوق الاجتماعية والاقتصادية والثقافية فلا ينشئ أية لجنة من هذا القبيل وإنما يقتصر الأمر على تعهد الدول بتقديم تقارير دورية عن مدى تنفيذها للحقوق الواردة بهذا الميثاق . فليس إذاً هناك ثمة اشتراع لتوقيع جزاء قانونى على الدول التى

---

(٢) انظر فى تفصيل هذه العوامل السياسية والاجتماعية والظروف الاقتصادية والفكرية .

Marcel Sulsny, Quelques observations sur les systèmes de Protection Internationale des Droits de L'Homme, *Mélanges Offerts à Henri Rolin,* Padone, Paris, 1964, pp. 392-396.

لا تعمل على تنفيذ الميثاقين المقترحين بما يفوق التزاماتها الحالية ، أو إنشاء جهاز قضائى خاص يقوم بالفصل فى المنازعات التى تنشب بين الدول فى هذا الخصوص بحكم بات وملزم ، فضلا عن حرمان الفرد والمؤسسات غير الرسمية فى الدولة من حق الشكوى والتظلم من انتهاك هذه الحقوق والحريات [1] .

الاتفاقية الأوروبية لحماية حقوق الإنسان والحريات الأساسية :

ولكن الذى تعذر تحقيقه على الصعيد العالمى فى نطاق لجنة حقوق الإنسان التابعة للأمم المتحدة ، قد أمكن التوصل إليه بأفضل ما سمحت به الظروف والأحوال على الصعيد الأقليمى لأوروبا الغربية (فى نطاق مجلس أوروبا) [2] بانشاء الاتفاقية الأوروبية لحماية حقوق الإنسان والحريات الأساسية فى ٤ نوفمبر سنة ١٩٥٠ ، ثم دخولها حيز التنفيذ فى ٣ سبتمبر سنة ١٩٥٣ بتصديق عشر دول [3] عليها تطبيقاً لحكم المادة ٦٦ منها ، وقيام اللجنة الأوروبية لحقوق الإنسان كجهاز توفيقى ، ثم المحكمة الأوروبية لحقوق الإنسان (بقبول ثمان دول لاختصاصها تطبيقاً لحكم المادة ٥٦ / ١ من الاتفاقية فى ٣ سبتمبر سنة

---

(١) René Cassin, *Le Droit de L'Homme en Droit Comparé,* Faculté Internationale de Droit Comparé, Luxembourg, 1959, II, pp. 31-35 (notes) ;

عبد الحميد عبد الغنى ، الميثاق الدولى لحقوق الإنسان ، المجلة المصرية للقانون الدولى ، المجلد الحادى عشر ، ١٩٥٥ ، ص ٧ - ٩ ، ١٢ - ١٣ ، ٢٤ .

(٢) يتكون مجلس أوروبا فى الوقت الحاضر من ١٧ دولة هى إنجلترا وفرنسا وبلجيكا وهولندا ولوكسمبرج وإيطاليا وألمانيا الغربية (فى ١٩٥١) والسويد وأيرلندا (وهما دولتان ليستا أعضاء بحلف الأطلنطى الشمالى والنرويج والدانمرك واليونان وتركيا وقبرص (فى ١٩٦١) وايسلندا والنمسا (فى ١٩٥٦) وسويسرا (فى ٦ مايو ١٩٦٣)

A.H. Robertson, *The Council of Europe,* 1961, pp. 16-21 ;

Roger Pinto, *Les Organisations Européennes,* Paris, 1963, pp. 79.

(٣) أصبح مجموع الدول التى صدقت على الاتفاقية والبروتوكول الأول الملحق بها (بروتوكول باريس فى ٢٠ مارس سنة ١٩٥٢) ١٦ دولة . ففرنسا هى الدولة الوحيدة التى لم تقبل التوقيع على الاتفاقية والالتزام بها حتى الوقت الحاضر ، نظراً لظروفها فى مشاكل المستعمرات ثم حرب الجزائر .Pinto, *Ibid,* p. 85

١٩٥٨) [1] كجهاز قضائى ذو إجراءات قانونية صرف يعمل على احترام حكم القانون وتنفيذ الالتزامات التى نصت عليها الاتفاقية الأوروبية فى هذا الشأن .

فالاتفاقية الأوروبية لحماية حقوق الإنسان والحريات الأساسية قد أصبحت منذ دخولها حيز التنفيذ فى ٣ سبتمبر سنة ١٩٥٣ (وكذلك البروتوكول الملحق بها — بروتوكول باريس الموقع فى ٢٠ مارس سنة ١٩٥٢ والذى دخل حيز التنفيذ فى ١٨ مايو سنة ١٩٥٤) [2] ، ولا سيما منذ قبول ست دول (طبقاً للمادة ٢٥ / ٤ من الاتفاقية) ، أصبحت عشراً فى الوقت الحاضر ، حق الأفراد وجماعاتهم فى توجيه الشكوى وطلب الانتصاف أمام اللجنة الأوروبية لحقوق الإنسان ، ومنذ قيام المحكمة الأوروبية لحقوق الإنسان ، تمثل أهم أعمال مجلس أوروبا فى سعيه لتحقيق أهدافه والمبادئ الأساسية لنظامه . فنظام مجلس أوروبا ينص فى مادته الثالثة على أن يشترط للعضوية فيه أن « يعترف كل عضو بمجلس أوروبا بمبدأ سلطان القانون وبحق كل فرد تحت ولايته فى التمتع بحقوق الإنسان وبالحريات الأساسية .. » . كذلك تنص المادة الرابعة من هذا النظام على أنه « يجوز للجنة الوزراء أن تدعو كل دولة أوروبية قادرة بملء إرادتها على تنفيذ أحكام المادة ٣ لتصبح عضواً فى مجلس أوروبا . . . » .

وعلى هذا الأساس لم تصبح عضوية كل من البرتغال وأسبانيا فى مجلس أوروبا محل بحث أو نظر [4] .

---

(١) هذه الدول هى النمسا وبلجيكا والدانمرك وألمانيا الغربية وأيسلندا وأيرلندا ولوكسمبرج وهولندا .

(٢) دخل هذا البروتوكول حيز التنفيذ بتصديق تركيا عليه فى التاريخ المشار إليه بوصفها الدولة العاشرة التى قامت بالتصديق حتى ذلك التاريخ .

(٣) الدول التى لم تقبل حق الأفراد فى الشكوى أمام اللجنة حتى الوقت الحاضر هى الدول الأربعة الآتية : اليونان وإيطاليا وتركيا وبريطانيا وقبرص وسويسرا ، خلافرنسا التى لم تصدق أصلا على الاتفاقية .

(٤) أثير نفس الوضع بالنسبة لعضوية تركيا فى المجلس خلال الدورة ١٣ من دورات الانعقاد العادى للجمعية الاستشارية فى يناير سنة ١٩٦٢ ، واعترض على حضور الوفد التركى=

وعلى هذا الأساس أيضاً أصبح البعض يرون أن العضوية فى الاتفاقية الأوروبية تعتبر مكملة للعضوية فى مجلس أوروبا ، واستدلوا على ذلك بنص المادة ٦٥ / ٣ التى تقول بأن « تتوقف كل دولة متعاقدة عن أن تكون طرفاً فى هذه الاتفاقية عندما تتوقف عن أن تكون عضواً فى مجلس أوروبا » . غير أن ذلك ليس صحيحاً ، لا سيما وأن الاتفاقية وكذلك البروتوكول الأول الملحق بها ، لا يفرض أى منهما التزاماً على الدول الموقعة عليهما بالتصديق عليهما والالتزام بأحكامهما . هذا فضلا عن أن المادة ٦٥ / ١ تبيح للدول أطراف الاتفاقية من أعضاء مجلس أوروبا أن تنقض الاتفاقية ، بعد انقضاء خمسة أعوام من ابتداء تاريخ سريان مفعولها بالنسبة لها ، وعلى أن يتم ذلك باعلان يسبق نقض الاتفاقية بستة شهور . ولا يمكن أن يستدل على نقيض ذلك ، تدعيماً للرأى القائل بأن الاتفاقية تشكل جزءاً لا يتجزأ من النظام ، بنص المادة ٨ من النظام التى تقول « يجوز إيقاف حقوق التمثيل لكل عضو بمجلس أوروبا يخرق حكم المادة ٣ » المشار إليها آنفاً فى شأن الاعتراف بسلطان القانون وحق كل فرد تحت ولايته فى التمتع بالحقوق والحريات ، لأن عدم التصديق على الاتفاقية والالتزام بأحكامها أو نقضها والانسحاب منها قد لا يشكل أى منهما فى حد ذاته ما يعتبر خرقاً لحكم المادة ٣ من النظام المشار إليها . وبالإضافة إلى كل ذلك ها نحن نرى فرنسا عضواً بمجلس أوروبا فى حين أنها لم تصدق على الاتفاقية[1] . وها نحن نرى الاتفاقية تضع نظاماً خاصاً بها هو نظام الشرط الاختيارى فى قبول الدول الأعضاء حق الشكوى وطلب

=الممثل لحكومة الانقلاب العسكرى التى لم تراع نص المادة ٣ من النظام حين قامت باعتقال وحبس بعض السياسيين الذين يخالفونها فى الرأى

انظر فى هذا الشأن Pinto, *op. cit.*, p. 79.

وقد انضمت سويسرا إلى مجلس أوروبا على أساس أنه ليس محالفة سياسية أو عسكرية تتعارض مع حيادها الدائم – انظر فى ذلك

Annuaire Français, 1963, pp. 699-700.

(١) انظر فى تفصيل موقف فرنسا من عدم التصديق على الاتفاقية
Pinto, *op. cit.*, pp. 86-88.

الانتصاف منها أمام اللجنة ، والشرط الاختيارى الخاص بقبول الاختصاص الالزامى للمحكمة فى تفسير أو تطبيق الاتفاقية ، مما يحمل على الجزم بأن للاتفاقية نظامها واجراءاتها المتميزة والخاصة بها . أما القول بأن المحكمة التى تنشئها الاتفاقية تتكون من عدد من القضاة يساوي عدد أعضاء مجلس أوروبا (نص المادة ٣٨ من الاتفاقية) ، وأنه من الصعب أن يتصور وجود قاض بالمحكمة ينتمى إلى أحد الدول الأعضاء بالمجلس والتى ليست عضواً يلتزم بأحكام الاتفاقية دون أن نتصور كون الاتفاقية والنظام يشكلان كلا واحداً ، فيمكن الرد عليه بأن الاتفاقية لا تشترط بالضرورة أن يكون جميع القضاة ، وكذلك أعضاء اللجنة ، من رعايا الدول الموقعة عليها أو من رعايا الدول الأعضاء بمجلس أوروبا . وعلى هذا الأساس يمكن أن يصبح قاضياً بالمحكمة أو عضواً باللجنة من ينتمون إلى إقليم آخر خارج نطاق أوروبا الغربية . هذا فضلا عن أن اللجنة مثلا تتألف من عدد من الأعضاء يساوي عدد أعضاء الاتفاقية (المادة ٢٠ من الاتفاقية) لا عدد أعضاء مجلس أوروبا كما هو الشأن فى تشكيل المحكمة . وتبيح الاتفاقية فى الوقت نفسه ، نتيجة أخذها بنظام الشرط الاختيارى فى قبول شكاوى الأفراد أمام اللجنة وفى قبول اختصاص المحكمة ، أن ينتخب عضواً باللجنة أحد رعايا الدول التى لم تقبل حق شكوى الأفراد لينظر مثل هذه الشكاوى ضد الدول الأخرى ، أو أن ينتخب عضواً بالمحكمة من ينتمى إلى إحدى الدول الأعضاء التى لم تقبل اختصاصها الالزامى ليفصل فى المنازعات التى تصبح دولة أخرى طرفاً فيها[1].

---

(١) ويمكن أن يضاف إلى ذلك شروط العضوية فى لجنة الوزراء حيث يمكن لأحد أعضائها من رعايا بلد لا تنضم إلى الاتفاقية أن يشترك فى المداولات وإصدار القرارات النهائية والملزمة فى صدد المنازعات التى تحيلها إليها اللجنة ولضمان تنفيذ أحكام المحكمة
(*Ibid,* pp. 85-86.)

ويقترح البعض للتوفيق بين الرأيين أن لجنة الوزراء تستطيع أن تشترط لقبول دولة فى المجلس شروطاً سياسية كوجوب الانضمام إلى الاتفاقية ، ولو أنه لم يحدث أن اشترطت اللجنة ذلك صراحة أوضمنا عند انضمام النمسا وقبرص وسويسرا

(Karel Vasak, *La Convention Européenne des Droits de L'Homme,* Paris, 1964, pp. 283-284.

من ثم يمكن الانتهاء إلى أنه على الرغم من أن الاتفاقية الأوروبية لا تشكل على قول البعض جزءاً من نظام مجلس أوروبا ، إلا أنها قد استمدت مصادرها الأساسية لا من الإعلان العالمى لحقوق الإنسان فحسب ، وإنما كذلك من أحكام هذا النظام وديباجته بصفة أساسية . فالاتفاقية من ناحية ، قد استهلت ديباجتها بالإشارة إلى الإعلان العالمى لحقوق الإنسان ، وجعلته نموذجاً يحتذى به فى تضمينها الحقوق والحريات التى تعتبر أساسية فى مفهوم النظام السياسى والديمقراطى لبلاد أوروبا الغربية . والاتفاقية من ناحية أخرى ، تشير فى ديباجتها كذلك إلى أنها قد حددت إطارها ومضمون الحقوق والحريات التى ضمنت الاعتراف بها وكفالة تنفيذها بما استهدفه مجلس أوروبا — كمنظمة سياسية — من مثل عليا وتقاليد سياسية فى احترام الحرية وسيادة القانون[1] .

وعلى هذا الأساس خرجت الاتفاقية الأوروبية — من حيث هى معاهدة شارعة تضع قواعد قانونية ملزمة للدول الأطراف فيها — تعنى أولا بتأكيد القواعد الجوهرية التى يقوم عليها صرح الفكرة الديمقراطية فى أوروبا الغربية وتمييز الحقوق والحريات المتصلة بها وتحديد مضمونها بالنص عليها فى الباب الأول منها والبرتوكولات الملحقة بها[2] . وهى ثانياً تؤكد اعتراف الدول الأعضاء فيها بمضمون هذه الحقوق والحريات وضمانها حق التمتع بها لجميع الأفراد الخاضعين لاختصاصها القضائى ومراعاتها احترامها لدى إصدار قوانينها وتشريعاتها الداخلية . وهى ثالثاً تؤكد قبول الدول الأعضاء فيها التدخل من قبل سلطة الإشراف الدولى (الممثلة فى قيام اللجنة الأوروبية

---

(١) انظر فى هذا الشأن المرجع السابق .Karel Vasak, pp. 282-283

(٢) ألحق بالاتفاقية بروتوكول ٢٠ مارس سنة ١٩٥٢ السابق الإشارة إليه . وفى ٦ مايو سنة ١٩٦٣ وقع بستراسبورج البروتوكول رقم ٢ بشأن اختصاص المحكمة الأوروبية لحقوق الإنسان باصدار فتاوى فى المسائل القانونية الخاصة بتفسير الاتفاقية والبروتوكول الملحق بها ، وذلك بناء على طلب لجنة الوزراء وبموافقة الثلثين من أعضائها ، وبشرط ألا تمس هذه الفتاوى مضمون أو نطاق الحقوق والحريات المحددة فى الباب الأول من الاتفاقية والبروتوكول الملحق بها أو أية مسألة تكون أمام اللجنة الأوروبية لحقوق الإنسان أو المحكمة أو لجنة الوزراء . كما وقع فى نفس التاريخ بستراسبورج البروتوكول رقم ٣ المعدل للمواد ٢٩ و ٣٠ و ٣٤ من الاتفاقية .=

لحقوق الإنسان والمحكمة الأوروبية لحقوق الإنسان) لتنظيم العلاقة بينها وبين رعاياها، وفض ما ينشأ بينهم فى هذا الصدد من منازعات رعاية وكفالة لتنفيذ احترام هذه الحقوق والحريات .

نطاق تطبيق الاتفاقية الأوروبية :

فمن حيث الحقوق والحريات التى تضمنتها الاتفاقية واعترفت الأطراف المتعاقدة فيها بحق كل إنسان يخضع لاختصاصها القضائى أن يتمتع بها (المادة الأولى) نرى حق كل إنسان فى الحياة ، حتى لا يجوز قتله عمداً إلا تنفيذاً لحكم بالاعدام ، كمصدر لكافة الحقوق الأخرى (المادة ٢ من الاتفاقية والمادة ٣ من الإعلان العالمى) ؛ وحق كل إنسان فى سلامة شخصه الجسمانية ، بحيث لا يجوز تعريضه للتعذيب ولا لعقوبات أو معاملة وحشية أو حاطة بالكرامة (المادة ٣ من الاتفاقية والمادة ٣ والمادة ٥ من الإعلان العالمى) ؛ وحق كل إنسان فى حريته القانونية فلا يجوز استرقاقه أو ارغامه على أداء عمل عنوة (المادة ٤ من الاتفاقية والمادة ٤ من الإعلان العالمى) ؛ وأن لكل إنسان الحق فى الحرية والأمان فلا يجوز القبض عليه أو حبسه إلا بالطرق القانونية (المادة ٥ من الاتفاقية والمادة ٩ من الإعلان العالمى) ؛ وأن لكل إنسان الحق فى محاكمة عادلة وعلنية (المادة ٦ من الاتفاقية والمادة ٨ من الإعلان العالمى) ؛ وحق كل إنسان فى أن تحترم حياته الخاصة وحياته العائلية ومسكنه ومراسلاته

= وينص البروتوكولان الأخيران (المادة ٥ / ٢ من البروتوكول رقم ٢) على أن لا يصبحا نافذين إلا بانضمام جميع أعضاء الاتفاقية إليهما .

وفى ١٦ سبتمبر سنة ١٩٦٣ وقع بستراسبورج البروتوكول رقم ٤ لضمان بعض الحقوق والحريات التى أغفلت الاتفاقية وبروتوكول ٢٠ مارس سنة ١٩٥٢ النص عليها . ويصبح هذا البروتوكول نافذاً فى حق الدول المنضمة إليه بايداع خمسة دول وثائق التصديق عليه (المادة ٧ من البروتوكول) . وقد صدقت عليه حتى الآن السويد والنرويج فقط .

انظر نصوص هذه البروتوكولات فى

American Journal of International Law, Vol. 58, Jan., 1964, Documents, p. 331.

(المادة ٨ والمادة ١٢ من الاتفاقية والمادة ١٢ والمادة ١٦ من الإعلان العالمى) وحرية الصحافة والضمير والدين (المادة ٩ من الاتفاقية والمادة ١٨ من الإعلان العالمى) ؛ وحرية التعبير (المادة ١٠ من الاتفاقية والمادة ١٩ من الإعلان العالمى) ؛ وحرية الاجتماع (المادة ١١ من الاتفاقية والمادة ٢٠ من الإعلان العالمى) [١] .

وعلى الرغم من استكمال الاتفاقية ببروتوكول ٢٠ مارس سنة ١٩٥٢ الذى يضيف إلى مجموع الحقوق والحريات السياسية والمدنية المشار إليها حرية الشعب للتعبير عن رأيه فى اختيار الهيئة التشريعية عن طريق تنظيم انتخابات حرة بالاقتراع السرى (المادة ٣ من البروتوكول والمادة ٢١ / ٣ من الإعلان العالمى) ، إلى جانب حق الآباء فى اختيار نوع تربية أبنائهم وفقاً لعقائدهم الدينية والفلسفية كنوع من الحرية الاجتماعية (المادة ٢ من البروتوكول والمادة ٢٦ / ٣ من الإعلان العالمى) ، وحق كل شخص طبيعى أو معنوى فى احترام أمواله ولا يجوز حرمانه منها إلا من أجل المنفعة العامة كنوع من الحقوق الاقتصادية (المادة ١ من البروتوكول والمادة ١٧ من الإعلان العالمى) ، فمن الملاحظ أن مجموع الحقوق التى تنص عليها الاتفاقية والبروتوكول الأول الملحق بها لا تشكل جميع الحقوق والحريات السياسية والمدنية المعترف بها فى بلاد أوروبا الغربية ، فضلا عن أغفالها الواضح لبقية الحقوق ذات الطابع الاقتصادى والاجتماعى التى أتى بها الإعلان العالمى لحقوق الإنسان [٢] .

---

(١) انظر نص الاتفاقية والبروتوكول الأول الملحق بها فى الوثائق الملحقة ببعض المؤلفات المشار إليها هنا ولا سيما النص الفرنسى فى مؤلف Vasak والنص الإنجليزى فى الوارد مؤلف Ganji ولا يحسن الاعتماد فقط على النص العربى الوارد فى المجلة المصرية للقانون الدولى ، سنة ١٩٥٥ ، ص ٤٩ لوجود بعض الأخطاء .

(٢) تجدر الإشارة هنا ، ما دمنا فى ميدان المقارنة بين الإعلان العالمى والاتفاقية الأوروبية إلى أن الاتفاقية الأخيرة فى نصها على الحقوق والحريات الواردة بها قد جاءت أدق وأوضح فى صياغة موادها ، الأمر الذى يسر تضمينها التشريعات الوطنية لبلاد الدول الأعضاء فيها وتطبيق أحكامها وتنفيذها من قبل السلطات الوطنية فى تلك البلاد

Sir Humphrey Waldock, General Course On Public International Law, *Recueil des Cours*, 1962, II (106), p. 202.

ولنقارن على سبيل المثال نص المادة ١٧ من الاعلان العالمى « بحق كل شخص التملك بمفرده =

حقاً لقد أراد مجلس أوروبا أن يتلافى النقد الذى وجه إليه فى هذا الصدد، من حيث أن الحقوق والحريات لا تتجزأ ، وأن استكمال حمايتها وكفالة تنفيذها لا يتحقق بالضمان الجماعى لبعضها دون البعض الآخر ، فانشأ « الميثاق الاجتماعى الأوروبى » الموقع فى تورين فى ١٨ أكتوبر سنة ١٩٦١ . غير أن الميثاق المذكور خيب الظنون لأنه لم ينشئ من وسائل الحماية لتنفيذ الالتزامات التى يفرضها مثلما فعلت الاتفاقية الأوروبية لحقوق الإنسان ، حتى قيل فى هذا الصدد أنه لو لم تنشأ الاتفاقية الأوروبية فى عهد جد قريب من نهاية الحرب العالمية الثانية سنة ١٩٤٥ وانقلاب براغ سنة ١٩٤٨ ، وتأخر قيامها إلى سنة ١٩٦١ لما حققت من الضمانات للحقوق السياسية والمدنية التى أتت بالنص على كفالة احترامها وتنفيذها مثل ما حققت على الصعيدين الوطنى والدولى[1] .

أما الحقوق والحريات السياسية والمدنية التى لم تأت الاتفاقية والبروتوكول الأول الملحق بها على ذكرها ، فمن قبيلها حق كل فرد فى التنقل واختيار محل إقامته داخل حدود كل دولة وأن يغادر أية بلاد بما فى ذلك بلده ، كما يحق له العودة إليه (المادة ١٣ من الإعلان العالمى) ؛ وعدم جواز نفى أى إنسان تعسفياً (المادة ٩ من الإعلان العالمى) ؛ وحق كل فرد فى أن يلجأ إلى بلاد أخرى هرباً من الاضطهاد السياسى (المادة ١٤ من الإعلان العالمى) ؛ وحق كل فرد فى أن يتمتع بجنسية ما وعدم جواز حرمانه من جنسيته تعسفاً أو إنكار حقه فى تغييرها (المادة ١٥ من الإعلان العالمى) . فهذه الحقوق تعتبر ولا شك من أصول ضمان واستيفاء الديمقراطية السياسية . ولهذا فان مجلس

=أو بالاشتراك مع غيره ، وعدم جواز تجريده من ملكه تعسفاً » بنص المادة الأولى من بروتوكول ٢٠ مارس سنة ١٩٥٢ « بحق كل شخص طبيعى أو معنوى فى احترام أمواله وعدم جواز حرمانه منها إلا من أجل المنفعة العامة ». كذلك لنقارن نص المادة ٩ من الاعلان العالمى « بعدم جواز النفى تعسفياً» بنص المادة ٣ / ١ ونص المادة ٤ من بروتوكول ١٦ سبتمبر سنة ١٩٦٣ بعدم جواز النفى أو الطرد فردياً أو جماعياً للمواطنين وعدم جواز الطرد الجماعى للأجانب .

(١) Vasak, *op. cit*, pp. 79-80.

وانظر فى تفصيل الميثاق الاجتماعى الأوروبى .

Baron F.M. Van Asbeck, La Charte Sociale Européenne, *Mélanges Henri Rolin*, Paris, 1964, p. 427.

أوروبا قد اتجه مؤخراً إلى الاعتراف ببعضها وتضمينها البروتوكول رقم ٤ الموقع فى ١٦ سبتمبر سنة ١٩٦٣ ، حيث نص فى المادتين ٢ ، ٣ / ٢ منه على حق التنقل واختيار محل الإقامة أو مغادرة البلاد والعودة إليها ، كما نص فى المادة ٣ / ١ منه على عدم جواز النفى أو الطرد فردياً أو جماعياً للمواطنين وفى المادة ٤ على عدم جواز الطرد الجماعى للأجانب . كذلك نصت المادة الأولى من هذا البروتوكول على عدم جواز حبس أى شخص (المدين) نتيجة عدم قدرته على الوفاء بالتزاماته التعاقديه[1] .

وواقع الأمر أن الاتفاقية الأوروبية والبروتوكولات الملحقة بها لا تتضمن من الحقوق والحريات إلا الحد الأدنى الذى يمكن حمايته بالوسائل القانونية والقضائية الفعالة ، والتى لا يسبب اختيارها أو الاعتراف بحمايتها مشاكل وعقبات فى طريق هذه الحماية الدولية ، وإن لم يكن لبعضها أهمية عملية كبرى فى هذا المضمار . فالاتفاقية الأوروبية كما هو واضح من اسمها اتفاقية « حماية » للحقوق والحريات ، وليست مجرد اتفاقية للاعتراف بماهية هذه الحقوق أو الحريات . وهذه الحماية هى التى تثير كافة الاشكالات والآراء فى الفقه الدولى وفى الناحية العملية كذلك . وإلا لماذا يضمن ويحمى حق الفرد فى الزواج وتأسيس أسرة (المادة ١٢ من الاتفاقية والمادة ١٦ من الإعلان العالمى) — هذا الحق الذى لم ينشب بشأنه نزاع أو شكوى أمام اللجنة الأوروبية لحقوق الإنسان سوى مرة أو مرتين — ويهمل من قبل حق كل فرد فى التنقل واختيار محل الإقامة أو مغادرة البلاد والعودة إليها أو يهمل حق كل شخص فى التمتع بجنسية ما وعدم جواز حرمانه منها حتى الوقت الحاضر ،

---

(١) عرفت بعض القوانين الأوروبية كالقانون الهولندى الحاضر نظام حبس المدين الأجنبى أثناء مروره بالبلاد (التجار مثلا) حتى يقوم بسداد الدين ، كأثر من آثار القانون الرومانى فى استرقاق المدين . ومن الملاحظ أن هولندا ليست من البلاد الموقعة على هذا البروتوكول فى ١٦ سبتمبر سنة ١٩٦٣

(*American Journal of International Law*, Jan., 1964, p. 336.

على أهمية هذه الحقوق[1] . ولماذا يضمن البروتوكول الأول الملحق بالاتفاقية كفالة حق الشعب فى التعبير عن رأيه فى اختيار الهيئة التشريعية أو بالأحرى حقه فى تنظيم المعارضة السياسية ، دون أن يكون له فى الوقت الحاضر حق التنظيم النقابى أو الحريات الاجتماعية .

فالواقع أن الاتفاقية الأوروبية « لحماية » حقوق الإنسان والحريات الأساسية قد راعت الاعتبارات العملية فى حماية هذه الحقوق ، وفضلت أن تركز على الجانب البناء لاقرار مبدأ الحماية ، حتى ولوكان ذلك سبباً فى ترك بعض الثغرات بعدم النص على بعض الحقوق التقليدية المنتهى إلى الاعتراف بها فى بلاد أوروبا الغربية أو بعضها، ما دام لا يمكن حمايتها دولياً أوقضائياً فى الوقت الحاضر .

وقد جاءت ديباجة الاتفاقية واضحة وصريحة فى تبيان هذا القصد، حيث نصت على أن الدول المتعاقدة قد وطدت عزمها على أن « تتخذ التدابير الأولى الكفيلة بتحقيق ضمان جماعى لبعض الحقوق المبينة بالإعلان العالمى » . كما نص تقرير لجنة الشئون القانونية والإدارية المتفرعة عن الجمعية الاستشارية لمجلس أوروبا فى دور اجتماعها الأول « أنه من المناسب أن نحمى الديمقراطية السياسية داخل نطاق الاتحاد الأوروبى ، وأن ننسق اقتصادياتنا قبل أن نتطرق إلى تعميم الديمقراطية الاجتماعية »[2] .

وعلى هذا الأساس أهملت الاتفاقية والبروتوكولات الملحقة بها النص على الحقوق الاقتصادية والاجتماعية (فيما عدا حق الملكية[3] المنصوص عليه فى المادة ١ من بروتوكول ٢٠ مارس سنة ١٩٥٢) المنصوص عليها فى المواد ٢٢ — ٢٥ من الإعلان العالمى لحقوق الإنسان ، كحق الضمان الاجتماعى (المادة ٢٢ من الإعلان العالمى) وحق العمل (المادة ٢٣ من الإعلان العالمى)

---

(١) Vasak, *op. cit.*, pp. 15, 16, 80.

(٢) Pinto, *op. cit.*, p. 83.

(٣) انظر فى شأن حماية هذا الحق

Vasak, *op. cit.*, pp. 63-66 ; Pinto, *op. cit.*, pp. 93-100.

وحق الأجر المتساوى والعادل (المادة ٢٣ من الإعلان العالمى) وحق إنشاء النقابات والانضمام إليها (المادة ٢٣ من الإعلان العالمى) وحق الراحة والحق فى أوقات الفراغ والعطلات الدورية بأجر (المادة ٢٤ من الإعلان العالمى) والحق فى تحديد معقول لساعات العمل (المادة ٢٤ من الإعلان العالمى) والحق فى مستوى من المعيشة كاف للمحافظة على الصحة للفرد وأسرته بما فى ذلك التغذية والملبس والمسكن والرعاية الطبية والخدمات الاجتماعية (المادة ٢٥ من الإعلان العالمى) والحق فى تأمين المعيشة فى حالات البطالة والمرض والعجز والشيخوخة والترمل (المادة ٢٥ من الإعلان العالمى) وحق الأمومة والطفولة فى الرعاية والمساعدة والحماية الاجتماعية وبصرف النظر عما إذا كانت ولادة الطفل ناتجة عن رباط شرعى أم بطريقة غير شرعية (المادة ٢٥ / ٢ من الإعلان العالمى)[1].

إزاء ذلك وجدت اللجنة الأوروبية لحقوق الإنسان ، وهى الجهاز القائم على رقابة تنفيذ الاتفاقية وتطبيقها فى الدول الأعضاء بصفة أصلية ، نفسها مضطرة لأن تعلن عدم اختصاصها بنظر شكاوى الأفراد وطلباتهم فى الانتصاف من عدم مراعاة الدول تلك الحقوق الاجتماعية والاقتصادية التى لم تنص الاتفاقية على تمتعهم بها . ومن هذا القبيل أن اللجنة قد رفضت بقرار منها فى ٢٩ ديسمبر سنة ١٩٥٦ الطلب المقدم من أحد اللاجئين الألمان إلى جمهورية ألمانيا الاتحادية من جمهورية ألمانيا الديمقراطية بسبب أن سلطات البلدية فى الجمهورية الأولى لم تهيئ له الحصول على المسكن الملائم لكفالة مستوى من المعيشة كاف لضمان الكرامة البشرية ، حيث أن الاتفاقية الأوروبية لا تضمن لرعايا الدول المنضمة إليها هذا الحق الذى جاء به الإعلان العالمى لحقوق الإنسان فى المادة ٢٥ / ١ منه . كذلك رفضت اللجنة لنفس

---

(١) من الملاحظ أن عدداً من هذه الحقوق الاجتماعية والاقتصادية يضمنها دستور منظمة العمل الدولية والاتفاقيات والتوصيات الصادرة عنها – انظر فى هذا الشأن بحثنا عن الضمانات الدولية لحقوق الإنسان ، المجلة المصرية للقانون الدولى ، العدد العشرون ، سنة ١٩٦٤ .

السبب بقرارها فى ١٩ سبتمبر سنة ١٩٦١ الطلب المقدم من أحد الألمان على أساس حقه فى الترخيص له بممارسة مهنة التجارة (المادة ٢٣ / ١ من الإعلان العالمى) ، كما رفضت بقرارها فى ١٦ ديسمبر سنة ١٩٥٥ الشكوى المقدمة من أحد عمال الخطوط الحديدية البلجيكية لعدم حصوله على حقه فى المعاش (المادة ٢٥ / ١ من الإعلان العالمى) ، ورفضت فى ٧ يوليه سنة ١٩٥٩ طلباً آخر لعدم الحصول على العطلة الأسبوعية بأجر (المادة ٢٤ من الإعلان العالمى) ، وكذلك طلباً لعدم الحصول على التأمين الاجتماعى فى ١٨ سبتمبر سنة ١٩٦١ (المادة ٢٥ / ١ من الإعلان العالمى)[١].

واعتبرت اللجنة أن حق تولى الوظائف العامة فى البلاد هو من قبيل الحقوق الاقتصادية والاجتماعية التى لم تضمنها الاتفاقية لرعايا الدول المنضمة إليها ، أسوة بما عليه الحال فى نص المادة ٢١ / ٢ من الإعلان العالمى . وعلى هذا الأساس رفضت طلباً لأحد الأفراد بقرارها فى ١٦ ديسمبر سنة ١٩٥٥ ، ورفضت طلباً مماثلا لأحد الموظفين الألمان السابقين بقرارها فى ٢٨ أغسطس سنة ١٩٥٧ ، كما رفضت شكوى أحد الهولنديين من عدم التحاقه بخدمة القوات العسكرية فى ١١ أبريل سنة ١٩٦١[٢].

وفى ضوء نفس الاعتبارات قررت اللجنة بالنسبة للحقوق السياسية والمدنية التى لم تقم الاتفاقية بحمايتها ، رفضها نظر شكوى أحد الألمان الذين حرموا من جنسيتهم ، على أساس أن ليس بالاتفاقية نص مماثل لنص المادة ١٥ / ٢ من الإعلان العالمى ، وذلك بقرار اللجنة فى ٢٩ أغسطس سنة ١٩٥٧ . كذلك أصدرت اللجنة عدة قرارات برفض حق دخول الأجانب دولة ليسوا من رعاياها وحقهم فى الإقامة بها (قرار ٧ مارس سنة ١٩٥٨ ، وقرار ١٣ أبريل سنة ١٩٦١ ، وقرار ٢٩ مايو سنة ١٩٦١) ، وأخرى برفض

(١) *Annuaire de la Convention Européenne des Droits de L'Homme*, Vol. I, La Haye, 1959, pp. 198, 202 ; Pinto, *op cit.*, pp. 89-90.

(٢) *Ibid*, p. 301 ; Pinto, *op. cit.*, p. 90.

حق المواطن فى الإقامة على أرض دولته وعدم جواز نفيه أو طرده منها لعدم وجود نص يحمى هذا الحق فى الاتفاقية (قرار ٩ يونيه سنة ١٩٥٨) ، حتى صدو البروتوكول رقم ٤ الموقع فى ١٦ سبتمبر سنة ١٩٦٣ والذى ما زال ماثلا للتصديق والنفاذ(١).

وعلى الرغم من أن اللجنة قد أكدت هذا الاتجاه لدى نظرها عدداً كبيراً من الشكاوى ، إلا أنه قد عاودت النظر فى بعض شكاوى الأفراد بشأن الحقوق التى لم يأت بها نص من الاتفاقية بصريح العبارة ، ولكنها تتعلق فى الوقت نفسه بضمان ورعاية حق آخر نصت الاتفاقية على تمتع كل إنسان يخضع لاختصاص الدول المنضمة إليها به . ومن هذا القبيل أن اللجنة نظرت شكاوى الأجانب الذين يرغبون فى الإقامة على أرض دولة أخرى تتبعها زوجاتهم رعاية لنص المادة ٨ / ١ من الاتفاقية بشأن احترام الحياة الخاصة والعائلية ولنص المادة ١٢ من الاتفاقية بشأن حق الزواج وتأسيس الأسرة (قرار اللجنة فى ٩ يناير سنة ١٩٥٩) . بل أن اللجنة لم تجد فى مثل هذه الحالة ما يبرر حق الطرد أو منع الأزواج من الإقامة على أراضى الدول التى تتبعها زوجاتهم تأسيساً على دواعى السلامة الوطنية أو الأمن العام وحفظ النظام وغيرها من الاعتبارات التى تجيز فى شأنها المادة ٨ / ٢ من الاتفاقية للسلطات العامة فى الدولة أن تتعرض لحق الحياة الخاصة والعائلية بالأهدار (قرار اللجنة فى ١٣ أبريل سنة ١٩٦١)(٢).

والواقع أن اللجنة كانت تحكم كل حالة من مثل الحالات المشار إليها بظروفها . فهى مثلا قد رفضت قبول حق الأجنبى فى الإقامة على أرض دولة لا يتبعها رعاية لنص المادة ٣ من الاتفاقية بعدم تعريض أى إنسان لمعاملة حاطة بالكرامة ، واعتبرت أن التوسع فى هذا الاتجاه بإباحة بعض الحقوق التى لم ينص عليها تأسيساً على نص المادة ٣ هو أمر سابق لأوانه ، على الرغم

(١) *Ibid*, pp. 209, 211-215 ; *Ibid*, Tome II, p. 225 ; Pinto, *op. cit.*, pp. 91-92.

(٢) *Ibid*, Tome II, p. 352 ; Pinto, *op. cit.*, pp.92-93.

مما يبدو من عدم انسجام هذا القرار مع فقه اللجنة المشار إليه وعدم سلامته من الناحية القانونية البحتة كذلك (قرار اللجنة فى ٢٩ مايو سنة ١٩٦١)[1].
وهى على خلاف ذلك قد اتجهت — كما أشرنا آنفاً — نحو منح الأجنبى تأشيرة دخول لأرض دولة لا يتبعها كى يستطيع مباشرة حق التقاضى أمام المحاكم السويدية والظهور بشخصه أمامها ، تطبيقاً لحكم المادة ٦ من الاتفاقية ، نتيجة أن السلطات السويدية قد رفضت حقه فى زيارة ابنه القاصر المقيم على أرضها .
ولم يكن الاعتراف بهذا الحق فى الدخول — الذى لم يرد به نص قبل بروتوكول ١٦ سبتمبر سنة ١٩٦٣ الماثل للنفاذ والتصديق — إلا نتيجة ارتباطه بحق الانتصاف أمام قضاء وطنى عادل تطبيقاً لحكم المادة ٦ من الاتفاقية وبحق احترام الحياة الخاصة والعائلية تطبيقاً لحكم المادة ٨ / ١ منها كذلك (قرار اللجنة فى ٢٠ ديسمبر سنة ١٩٥٧)[2].

وأساساً تجدر الإشارة إلى مجموعة المبادئ التى تحكم تطبيق الاتفاقية وتحديد نطاقها ، من حيث التوسع فى تفسير الحقوق والحريات الواردة بها ، أو التضييق فيه بفرض بعض القيود التى تكفل ضبط مزاولة هذه الحقوق أو الحريات بما يتفق وضرورات حماية النظام السياسى والاجتماعى للديمقراطية الغربيـــة .

فمن حيث المبادئ التى تساعد على التوسع فى تفسير الاتفاقية وحماية بعض الحقوق والحريات التى لم يرد بشأنها نص صريح المبادئ الآتية :

١ — مبدأ عدم التمييز : فقد نصت المادة ١٤ من الاتفاقية على أنه « يجب تأمين التمتع بالحقوق والحريات المبينة بهذه الاتفاقية دون أى تمييز ولا سيما من حيث الجنس أو العنصر أو اللون أو اللغة أو بسبب الدين أو الآراء السياسية أو غيرها من الآراء أو الأصل القومى أو الاجتماعى أو الانتماء إلى أقلية قومية أو الثروة أو الميلاد أو أى وضع آخر » . وواضح من هذا النص

(١) Pinto, *op. cit.*, pp. 92-93.
(٢) Vasak, *op. cit.*, pp. 94-95, 99.

أن مبدأ عدم التميز الوارد به ليس مبدأ قابلا للتطبيق بصدد جميع الحقوق والحريات ، وإنما بصدد الحقوق والحريات المنصوص عليها فى الاتفاقية فحسب . فلا يمكن مثلا تطبيقه فى شأن التميز فى شغل الوظائف العامة أو حق ممارسة مهنة التجارة أو الحصول على عطلة أسبوعية بأجر (قرار اللاجنة فى ١٦ ديسمبر سنة ١٩٥٥ ، وقرارها فى ٧ يوليه سنة ١٩٥٩) . كذلك لم يكن من الممكن تطبيقه فى صدد الحقوق التى تضمن المساواة بين المواطنين أمام القانون ، حتى أقر هذه الحقوق بروتوكول ١٦ سبتمبر سنة ١٩٦٣ (المادة ٢ / ٣) . وعند ما يحين وقت نفاذ هذا البروتوكول فسوف يصبح عدم التميز بكافة أشكاله حتى ما يتعلق منه بأحد الحقوق أو الحريات التى لم تضمنها الاتفاقية صراحة حقاً تضمنه الاتفاقية[1] .

٢ ــ مبدأ عدم تجاوز السلطة : وتنص عليه المادة ١٨ من الاتفاقية حيث تورد حظراً مؤداه أنه « لا يجوز استخدام القيود التى توردها أحكام هذه الاتفاقية على الحقوق والحريات المذكورة إلا لتحقيق الغرض الذى فرضت من أجله » . وهكذا تؤكد هذه المادة إحكام رقابة السلطات المشرفة على تنفيذ الاتفاقية واحترام أحكامها ، بحيث لا تترك فرصة للسلطات الوطنية للدول الأعضاء فى التعسف فى استخدام سلطاتها أو تجاوز حدودها فى تطبيق القيود التى تفرضها الاتفاقية لحماية المجتمع الديمقراطى الغربى ، والتى ستأتى الإشارة إليها عاجلا[2] .

---

(١) من الواضح أن مبدأ عدم التمييز يتعلق بجميع الحقوق التى تحميها الاتفاقية والبروتوكولات النافذة الملحقة بها وذلك بالنسبة لجميع الأشخاص الخاضعين لاختصاص أى من الدول المتعاقدة ، ما عدا حق التصويت والانتخاب الذى يتعلق بمواطنى كل دولة على حدة .

وقد أثيرت مسألة عدم التمييز أمام اللجنة فى صدد شكاوى بعض الألمان الذكور من التمييز بينهم وبين الأناث فى صدد تحريم الشذوذ الجنسى بين الذكور وحدهم فى المادة ١٧٥ من قانون العقوبات الألمانى ومنافاة ذلك لنص المادة ١٤ من الاتفاقية الأوروبية . وقد أخطأت اللجنة بقرارها الذى قضى بصحة التمييز فى هذه الحالة التى اقتضت التحريم بين الرجال وحدهم كاجراءضرورى لحماية الصحة العامة والأخلاق تطبيقاً لحكم المادة ٨ / ٢ (قرار اللجنة فى ٢٨ سبتمبر سنة ١٩٥٦ وقرارها فى ١٦ ديسمبر سنة ١٩٥٧) .

Vasak, *op. cit.*, p. 74 ; Pinto, *op. cit.*, p. 134.

(٢) Vasak, *op. cit.*, p. 75.

٣ ــ مبدأ عدم المساس بالحقوق والحريات التى كفلت لها قوانين إحدى الدول الأعضاء المتعاقدة أو إحدى المعاهدات والاتفاقيات الأخرى المنضمة إليها حماية لم تقررها نصوص الاتفاقيةالأوروبية . وهذاالمبدأ قد أتت بالنص عليه المادة ٦٠ من الاتفاقية الأوروبية حيث تقول « لا يجوز تأويل أى حكم من أحكام هذه الاتفاقية على أنه يخول تحديد أو المساس بحقوق الإنسان والحريات الأساسية التى يمكن الاعتراف بها بالتطبيق لقوانين إحدى الدول المتعاقدة أو لأية اتفاقية أخرى تكون إحدى هذه الدول طرفاً فيها » . فالاتفاقية الأوروبية لا تحمل معنى الحد الأقصى للحقوق والحريات الواجب حمايتها فى بلاد الدول الأعضاء فيها ، وإنما تحمل معنى الحد الأدنى لهذه الحقوق التقليدية المعترف بها فى النظام الديمقراطى الغربى ، والتى رؤى أنه من الممكن الاتفاق حول حمايتها دولياً فى نطاق هذه الاتفاقية والأجهزة التى أنشأتها لذلك ، كما أشرنا من قبل[1] .

٤ ــ وأخيراً فان اللجنة الأوروبية لحقوق الإنسان عندما قررت فى قرارها الصادر فى ٣٠ يونيه سنة ١٩٥٩ بأن « الدولة التى توقع وتصدق على الاتفاقية الأوروبية لحقوق الإنسان كأنما تقبل تقييد حريتها فى ممارسة الحقوق التى يوليها القانون الدولى العام إياها . . . بالحدود والقيود التى تفرضها الالتزامات الواجبة عليها بانضمامها إلى هذه الاتفاقية » ، قد عنت تقرير مبدأ جديد فى تطبيق وتفسير الاتفاقية مؤداه أن رفض أحد الأطراف المتعاقدة الاعتراف بأحد الحقوق غير المنصوص عليها فى الاتفاقية صراحة قد يعنى خرق الاتفاقية متى كان حرمان أحد الأفراد أو الجماعات من هذا الحق يؤثر على حقه فى التمتع بممارسة أحد الحقوق التى تحميها الاتفاقية . وقد أشرنا فيما سبق إلى بعض القرارات التى اتخذتها اللجنة فى تأييد قيام هذا المبدأ ، الذى تطور واستقر بتبنى المحكمة الأوروبية لحقوق الإنسان له[2] .

(١) Vasak, *op. cit.*, p. 76.

(٢) Pinto, *op. cit.*, p. 135.

أما فيما يتعلق بالحدود والقيود التى فرضتها الاتفاقية لضبط مزاولة الحقوق والحريات التى نصت على حمايتها بما لا يتعارض وتحقيق هذه الحماية ودون اخلال بجوهر هذه الحقوق والحريات (المادة ١٨ من الاتفاقية) ، فيجدر تحديدها كالآتى :

١ — القيود العامة المنصوص عليها فى الفقرة الثانية من المواد ٨ و ٩ و ١٠ و ١١ بقصد التوفيق بين امكانية الاعتراف وحماية الحقوق والحريات المنصوص عليها فى هذه المواد (وهى حق احترام الحياة الخاصة والعائلية وحق حرية التفكير والضمير والدين والحق فى حرية الرأى والتعبير والحق فى حرية الاشتراك فى الاجتماعات السلمية وفى الجمعيات) وبين عدم الاخلال بسلامة الدولة والأمن العام وحفظ النظام العام (ومنع الجرائم أو حماية الصحة والأخلاق والرخاء الاقتصادى للبلاد وحقوق الآخرين وحرياتهم) نتيجة مزاولة تلك الحقوق أو الحريات فى المجتمع الديمقراطى لبلاد أوروبا الغربية . والواقع أن هذه القيود أو الحدود قد وضعت فى عبارات عامة ، حيث يصعب صياغتها فى شروط دقيقة فى الوقت الذى يصبح قيامها والاعتداد بها أمراً تقديرياً ورهناً بالظروف ووقائع الأحوال[١] .

٢ — القيود الخاصة بتحديد أو منع الحريات التى تسمح للأجانب بمزاولة النشاط السياسى فى بلاد الدول الأعضاء ، كحرية الرأى والتعبير (المادة ١٠) وحرية الاجتماع وتأسيس الجمعيات (المادة١١) ومبدأ عدم التمييز (المادة ١٤) ، وذلك تطبيقاً لنص المادة ١٦ من الاتفاقية والتى تقضى بأن « ليس فى أحكام المواد العاشرة والحادية عشرة والرابعة عشرة ما يجوز تأويله على أنه

---

(١) انظر فى هذا الشأن المناقشة بشأن مفهوم المجتمع الديمقراطى فى الاتفاقية الأوروبية .

René-Jean Dupuy, La Commission Européenne Des Droits de l'Homme, *Annuaire Français de Droit International,* Tome III, 1957, p. 464 ; Waldock, The European Convention For The Protection of Human Rights And Fundamental Freedoms, *British Yearbook Of International Law,* Vol. 34, 1958, p. 362.

يمنع الدول المتعاقدة من فرض قيود على النشاط السياسى للأجانب » . وعلى الرغم من أن هذه المادة لم تزد عن أن تقرر قاعدة موجودة ومستتبة فى العمل الدولى ، إلا أن فى النص عليها بالاتفاقية ما يولد خطراً على الحريات والحقوق الممنوحة لرعايا الدول الأعضاء على أرض دولة غير دولتهم ، ولا سيما أنها لم تضع تعريفاً معيناً يقيد أو يحدد فى الوقت نفسه ماهية النشاط السياسى الذى قد يزاوله هؤلاء الأجانب[1] .

٣ – القيود الخاصة بتحريم الاستفادة من الحقوق والحريات (التى تضمن الاتفاقية الاعتراف بها من قبل الدول الأعضاء وتحميها دولياً) قصد استغلالها فى القيام بنشاط أو عمل يهدف إلى هدم الأسس الديمقراطية الليبرالية لهذه الحقوق والحريات . فالاتفاقية الأوروبية على حد تعبير الأستاذ ديبوى R. Dupuy[2] لم توضع إلا بقصد الدفاع عن الأشكال التقليدية الغربية للمجتمع الليبرالى . ولهذا لم يغفل واضعوها امكان استغلالها من قبل معارضيهم لتقويض أسس وشكل هذا المجتمع ، وإن كانوا لم يرغبوا فى الإشارة صراحة إلى الأحزاب أو الحركات السياسية التى تعيش بين ظهرانيهم وتلعب دورها فى إشاعة الآراء والأفكار أو ممارسة الأعمال التى تستهدف تقويض نظامهم الاجتماعى . ولهذا نرى المادة ١٧ من الاتفاقية الأوروبية (التى تقابل المادة ٣٠ من الإعلان العالمى) تؤدى إلى كثير من اللبس والغموض عند تفسيرها . فالمادة المذكورة تنص على ما يأتى : « ليس فى الاتفاقية حكم يجوز تأويله على أنه يخول لأية دولة أو جماعة أو فرد أى حق فى القيام بنشاط أو عمل يهدف إلى هدم الحقوق والحريات المقررة فى الاتفاقية أو فرض قيود على هذه الحقوق والحريات أوسع من القيود الواردة بها » . والنص كما هو واضح ينطبق على الدول ، كما ينطبق على الجماعات والأفراد . غير أن النص حين يشير إلى الدول ، وهو يعنى بطبيعة الحال الدول أعضاء الاتفاقية ، إنما يؤكد التزاماتها

(١) Vasak, *op. cit.*, p. 68.
(٢) Dupuy, *op. cit.*, p. 464.

فى الاتفاقية باحترام الحقوق والحريات المبينة بها وعدم جواز تأويلها لنص من النصوص بما يتيح اهدار تلك الحقوق أو الحريات . وبعبارة أخرى ، فكأنما يشير النص فى هذا الخصوص إلى مبدأ عدم التعسف أو تجاوز حدود السلطة السابق الإشارة إليه ، فى المادة ١٨ من الاتفاقية ، بشكل أو صورة أخرى[1] .

أما فيما يتعلق بالجماعات والأفراد ، فان نص المادة ١٧ يرمى بوضوح إلى عدم جواز احتجاجهم بنصوص أخرى فى الاتفاقية تضمن وتحمى لهم حقوقاً وحريات معينة بمكن استغلال إباحة التمتع بها فى ممارسة نشاط أو القيام بأعمال تهدف إلى تقويض أسس هذه الحريات الاجتماعية أو وضع قيود عليها أوسع من تلك التى تنص عليها الاتفاقية . ومن ثم فكأنما تقرر المادة ١٧ فى هذا الخصوص مبدأ شبيهاً بمبدأ اسقاط الحق . وعلى هذا الأساس رفضت اللجنة الأوروبية لحقوق الإنسان (بقرارها فى ٢٠ يوليه سنة ١٩٥٧) طلب الحزب الشيوعى الألمانى فى ألمانيا الاتحادية بأن قرار السلطات الألمانية بحله (حكم المحكمة الفيدرالية الدستورية فى ١٧ أبريل سنة ١٩٥٦) فيه اهدار للحقوق والحريات التى تنص عليها الاتفاقية الأوروبية فى المواد ٩ ، ١٠ ، ١١ . وأشارت اللجنة فى قرارها برفض شكوى الحزب الشيوعى المذكور إلى الأعمال التحضيرية للاتفاقية (مناقشات الجمعية الاستشارية سنة ١٩٤٩) التى أتت على ذكر الغرض من إنشاء المادة ١٧ فى الاتفاقية لحماية نشاط التنظيمات والمؤسسات الدمقراطية وحريتها ، بينما يرمى الحزب الشيوعى الألمانى إلى مصادرة هذه الحرية وتقويض أسسها السياسية والاجتماعية عن طريق القيام بثورة عنيفة تفرض دكتاتورية البروليتاريا التى يتناقض قيامها وأغراض الاتفاقية الأوروبية ومبادئها[2] .

---

(١) Pinto, *op. cit.*, p. 137.

(٢) ***Annuaire***, **Tome I**, p. 225 ;

وانظر كذلك فى هذا الشأن فقه اللجنة بشأن تحريم ممارسة النشاط النازى باسم حرية الفكر والرأى والتعبير التى تحميها الاتفاقية فى المادتين ٩ و ١٠ ، وذلك فى الطلب رقم ١٧٤٧ / ٦٢ المقدم إلى اللجنة ضد الحكومة النمساوية من أحد مواطنيها

Collection Of Decisions Of The European Commission, No. 13, pp. 42, 54.

وقد أثارت الحكومة الأيرلندية حكم المادة ١٧ أثنـــاء نظر قضية Lawless أمام اللجنة الأوروبية لحقوق الإنسان والمحكمة الأوروبية لحقوق الإنسان ، وأدعت فى هذا الصدد أن مقدم الشكوى ينتمى إلى جماعة غير شرعية بحكم القانون تباشر نشاطاً من قبيل هذا النشاط الذى تحرمه المادة ١٧ من الاتفاقية الأوروبية . غير أن اللجنة لم تكتف بالأدلة التى قدمتها الحكومة الأيرلندية ولم تقر وجهة نظرها لتطبيق المادة ١٧ فى هذا الصدد (قرار ٣٠ أغسطس سنة ١٩٥٨)[1]. وكانت وجهة نظر اللجنة فى ذلك أنه وإن كانت المادة ١٧ من الاتفاقية ترمى إلى تحريم استغلال الجمعيات والمؤسسات ذات المبادئ والأهداف الشمولية للحقوق والحريات التى تضعها الاتفاقية فى صالح الأفراد والجماعات الديمقراطية الليبرالية ، فان ذلك لا يعنى بالضرورة حرمان جميع الأشخاص الذين ينتمون إلى المؤسسات ذات الأهداف الشمولية من جميع الحقوق والحريات التى تحميها لهم الاتفاقية الأوروبية . فاذا كان تطبيق المادة ١٧ يستوجب حرمانهم من الحقوق والحريات التى تمكنهم من الاشتراك فى نشاط هدام بالمعنى المومأ إليه فى هذه المادة (كالحق فى حرية التفكير والضمير والدين وحرية الرأى والتعبير وحرية الاشتراك فى الاجتماعات والجمعيات ، وهى الحقوق التى استند إليها الحزب الشيوعى الألمانى فى شكواه) ، فأنه – فى رأى اللجنة – لا يمكن القول بأن تطبيق المادة ١٧ المشار إليها فى حالتهم تلك يؤدى كذلك إلى مصادرة تمتعهم بالحقوق والحريات المنصوص عليها فى المادتين ٥ و ٦ من الاتفاقية بشأن الحرية الجسمانية دون القبض والحبس والحق فى نظر دعوى الفرد بطريقة عادلة علنية (وهى المواد والحقوق التى استند إليها لاولس الأيرلندى فى شكواه أمام اللجنة وأمام المحكمة ضد الحكومة الأيرلندية) . وأوضحت اللجنة فى هذا الصدد أن المادتين ٥ و ٦ ليست من قبيل النصوص الأخرى التى تضمن حقوقاً وحريات ذات علاقة بنشاط جماعة أو فرد ، قدر ما تتعلق بواجبات تفرض على عاتق

(١) *Ibid,* Tome II, pp. 308, 330-331.

السلطات العامة قبل جموع المواطنين . وواضح أن المادة ١٧ تتعرض فى وضع القيود التى توردها فى شأن تطبيق الاتفاقية إلى الحقوق والحريات الممنوحة للجماعات والأفراد ، دون أن تتعرض إلى الواجبات والالتزامات المفروضة على الدول[١] .

وقد اتجهت المحكمة الأوروبية لحقوق الإنسان فى حكمها الصادر فى أول يوليو سنة ١٩٦١ فى صدد هذه الدعوى ، إلى تأييد وجهة نظر اللجنة . وأضافت المحكمة فى هذا الصدد أن المادة ١٧ المذكورة ذات طابع سلبى ، حيث تهدف إلى الحيلولة دون امكان التمتع بحقوق وحريات يتيح استخدامها مباشرة نشاط أو القيام بأعمال تؤثر على حقوق الآخرين وحرياتهم المنصوص عليها فى الاتفاقية الأوروبية . ومن ثم فاذا كانت الحقوق والحريات المنصوص عليها فى المادتين ٥ و ٦ من الاتفاقية والتى يطالب لاولس بحمايتها له ، ليست من قبيل هذه الحقوق التى تسمح له أو غيره بممارسة النشاط أو الأعمال المشار إليها ، فيجب ألا تفسر المادة ١٧ فى مفهوم المخالفة بكونها تحرمه أيضاً منها[٢] .

٤ — القيود الخاصة بحالة الحرب أو الخطر العام وتنص عليها المادة ١٥/١ من الاتفاقية كالآتى :

« فى حالة الحرب أو الخطر العام الذى يهدد حياة الأمة يجوز لكل دولة سامية متعاقدة أن تتخذ تدابير تخالف الالتزامات المبينة بالاتفاقية فى حدود لا تتعدى ما تحتمه مقتضيات الحال وبشرط ألا تتعارض هذه التدابير مع الالتزامات الأخرى المقررة فى القانون الدولى » .

وتنص الفقرة الثانية من هذه المادة على أن الفقرة الأولى السابقة لا تجيز أية مخالفة لحق كل إنسان فى الحياة المنصوص عليه فى المادة الثانية من الاتفاقية (وذلك باستثناء حالة الوفاة نتيجة أعمال حربية مشروعة) . كما أنها لا تجيز أية مخالفة لحق الإنسان فى عدم التعرض له بالتعذيب ولا لعقوبات أو معاملة

---

(١) *Ibid.*

(٢) Council Of Europe, Directorate Of Information, *Doc. IP/1536.*

وحشية أو حاطة بالكرامة المنصوص عليها فى المادة الثالثة من الاتفاقية ، ولا تجيز أية مخالفة لعدم جواز الاسترقاق أو الاستعباد المنصوص عليه فى الفقرة الأولى من المادة الرابعة من الاتفاقية ، وكذلك بشأن حكم المادة السابعة من الاتفاقية فى صدد مبدأ عدم رجعية أحكام قانون العقوبات . وأخيراً تقضى الفقرة الثالثة من نص المادة ١٥ المذكورة بالزام الدول المتعاقدة بمواصلة امداد السكرتير العام لمجلس أوروبا ببيانات كاملة عن التدابير التى تتخذها بالتطبيق لحكم هذه المادة وعن الأسباب التى دعت إليها ، وتاريخ وقف هذه التدابير واستئناف تطبيق أحكام الاتفاقية تطبيقاً كاملا .

وهكذا يبين أن الدول الأعضاء فى الاتفاقية الأوروبية ليست مطلقة الحرية فى تطبيق نص المادة ١٥ /١ باتخاذ تدابير تخالف الالتزام بتنفيذ ورعاية الحقوق والحريات المعترف بها فى الاتفاقية ، وإنما هى مقيدة فى هذه الصدد بثلاثة قيود ، أولاها تطبيق نص المادة ١٥/١ فى الحدود التى لا تتعدى ما تحتمه مقتضيات الحال ، وثانيها ألا تتعارض هذه التدابير وكافة الالتزامات الأخرى المقررة فى القانون الدولى ، وثالثها عدم جواز مخالفة نصوص المواد ٢ ، ٣ ، ٤ / ١ ، ٧ من الاتفاقية عند إجراء التدابير المشار إليها فى المادة ١٥/ ١ المذكورة .

وقد لجأت إلى اتخاذ التدابير المنصوص عليها فى المادة ١٥ /١ ثلاث دول حتى الآن ، هى بريطانيا (فيما يتعلق بشمال أيرلندا وبعض أراضى ما وراء البحار ولا سيما قبرص باخطارها المرفوع إلى السكرتير العام فى ٧ أكتوبر سنة ١٩٥٥) وأيرلندا (من يوليه ١٩٥٧ حتى مارس سنة ١٩٦٢) وحكومة الانقلاب التركية (فى ٢٧ مايو سنة ١٩٦٠ و ٣١ مايو سنة ١٩٦٣)[1] .

---

(١) انظر فى شأن تبليغات هذه الدول الثلاثة إلى السكرتير العام لمجلس أوروبا بالتدابير التى اتخذتها تطبيقاً لنص المادة ١٥ / ١ والأسباب التى دعت إلى ذلك :

Annuaire, op. cit., Tome I, pp. 48-51 ; Tome II, pp. 79-87 ; Tome III, pp. 69-91 ; Tome IV, pp. 39-55 ; Tome V, p. 7 ; Vasak, *op. cit.,* p. 70 ; Manouchehr Ganji, *International Protection Of Human Rights,* Geneve, 1962, p. 233.

وعلى الرغم من أن اللجوء إلى تطبيق نص المادة ١٥ /١ من قبل الدول الأعضاء يضيق بالفعل من سلطة اللجنة الأوروبية لحقوق الإنسان والمحكمة الأوروبية لحقوق الإنسان فى أحكام الرقابة الدولية على تنفيذ الاتفاقية، ما دامت حالة الخطر العام أو الأزمة التى تهدد حياة الأمة هى مسألة اعتبارات وظروف تقديرية ، فان كلا من اللجنة والمحكمة لم ترددا فى تأكيد اختصاصهما فى تناول هذه الحالة بالبحث والتمحيص ، ولا سيا فيا يتعلق بالحدود التى يجب ألا يتعداها اتخاذ تلك التدابير[١]. قررت ذلك اللجنة بشأن الطلب رقم ١٧٦ /٥٦ الذي تقدمت به حكومة اليونان ضد بريطانيا بشأن تطبيق المادة ١٥ /١ إجحافاً بالحقوق والحريات التى تضمنها الاتفاقية الأوروبية فى قبرص[٢]. وقررت ذلك أيضاً عند نظرها لقضية لاولس حول ما إذا كان القبض الإدارى على الشاكى دون محاكمة ما بين ١٣ يوليه و ١١ ديسمبر سنة ١٩٥٧ (نظراً لحالة الطوارئ التى أعلنت بأيرلندا حينئذ لمواجهة الأخطار التى هددت حياة الأمة) يمكن تبريره فى مخالفة نصى المادتين ٥ و ٦ من الاتفاقية بحكم المادة ١٥ / ١ منها[٣].

وعندما نظرت المحكمة قضية لاولس وتحرت ظروف تطبيق المادة ١/١٥ واتخاذ التدابير الاستثنائية فى صددها ، أبدت بادئ ذى بدء رأيها فى عدم جواز تحلل الحكومات من جميع ارتباطاتها والتزاماتها بموجب الاتفاقية نتيجة قيام مثل هذه الظروف . وتناولت المحكمة بالبحث فى هذا الصدد ثلاث مسائل رئيسية :

أولاها، تتعلق بالخطر العام الذي يهدد حياة الأمة ويوجب تطبيق المادة

---

(١) Pinto, *op. cit.*, p. 140 ; Vasak, *op. cit.*, p. 71.

(٢) اعترفت اللجنة بحق بريطانيا فى اتخاذ حد معين من التدابير الضرورية لمواجهة الموقف ، ولكن لجنة الوزراء التى أحيل إليها تقرير اللجنة الأوروبية لحقوق الإنسان فى هذا الصدد لم تتخذ قراراً فى الموضوع قبل الوصول إلى حل سياسى لقضية قبرص بين الأطراف المعنية .
Annuaire, op. cit., Tome II, pp. 175-179.

(٣) *Annuaire, op. cit.,* Tome II, pp. 331-335.

١٥ / ١ . وأفادت المحكمة فى ذلك أن الأمة الأيرلندية قد واجهت بالفعل هذا الخطر الذى عرفته اللجنة بكونه « حالة أزمة أو خطر استثنائى وداهم يؤثر على جموع الأهلين ويشكل تهديداً لحياة المجتمع الذي يكون الدولة » . وحددت المحكمة الوقائع التى تثبت قيام هذا الخطر بتوافر ثلاثة اعتبارات هى : قيام جيش سري مسلح على أراضى الجمهورية الأيرلندية باسم الجيش الجمهورى الأيرلندى .I.R.A ، ومباشرة هذا الجيش لأعمال الارهاب منذ خريف سنة ١٩٥٦ حتى مطلع سنة ١٩٥٧ ، واستخدامه العنف خارج أراضى الجمهورية الأيرلندية بقصد ضم بعض أراضى شمال أيرلندا إليها بما يؤثر على علاقات أيرلندا مع جيرانها . ومن ثم انتهت المحكمة فيما يتعلق بهذه المسألة إلى تبرير لجوء الحكومة الأيرلندية إلى التدابير الاستثنائية وتطبيق المادة ١٥ / ١ من الاتفاقية الأوروبية ، سعياً منها إلى المحافظة على النظام ، بعد أن حاولت التمسك بأهداف القوانين والاجراءات الطبيعية التى تتفق والأوضاع التشريعية العادية لأقصى حد ممكن[١] .

وتتعلق المسألة الثانية التى بحثتها المحكمة بما إذا كان حجز لاولس إدارياً فى أحد المعسكرات الحربية دون تقديمه إلى القضاء للنظر فى أمره بطريقة عادلة وعلنية ، كان أمراً يحتمه الموقف أم يتعدى الضرورات ومقتضيات الأحوال ؟ ! فقد رأى ستة من أعضاء اللجنة (على خلاف الثمانية الآخرين من أعضائها الذين شكلوا الأغلبية) أن الظروف لم تكن تقتضى اللجوء إلى الحجز الإدارى كأحد الإجراءات أو التدابير اللازم اتخاذها عند تطبيق المادة ١٥ / ١ فى هذه الحالة ، وأنه كان من الممكن أن تكتفى الحكومة الأيرلندية بالتدابير الأخرى التى اتخذتها فى هذا الصدد كاغلاق الحدود مع شمال أيرلندا أو تشكيل المحاكم الجنائية الخاصة والمحاكم العسكرية . ولكن المحكمة أجمعت على تبنى رأى الأغلبية من اضطرار الحكومة الأيرلندية إلى اللجوء

(١) Pinto, *op. cit.*, pp. 140-141 ; Vasak, *op. cit.*, 189-190.

إلى الحجز الإداري فى ظروف الموقف القائم حينئذ ، ما دامت قد أحاطته بكافة الضمانات التى تحول دون سوء استخدام السلطة وعدم تجاوزها ،ولا سيما بقيام السلطة التشريعية بمراقبة وسائل تنفيذ هذه الإجراءات الاستثنائية ومقدرتها على القيام بالغائها فوراً وفى أية لحظة ترتأى فيها ذلك . هذا فضلا عن أن الحكومة الأيرلندية قد شكلت لجنة تضم عدداً من القضاة للنظر فى أمر المقبوض عليهم وتقرير اطلاق سراح من تراهم . كما أعطت الحكومة فرصة لجميع المقبوض عليهم باطلاق سراحهم إذا قدموا التعهد اللازم باحترام القانون والنظام والامتناع عن القيام بالنشاط الارهابى الذي كانت تباشره المنظمة السرية المشار إليها . وبالفعل فقد أطلق سراح لاولس بمجرد أن قام بتقديم التعهد المذكور فى ١٠ ديسمبر سنة ١٩٥٧[١].

وتتعلق المسألة الثالثة بما إذا كانت التدابير التى اتخذتها الحكومة الأيرلندية قد تعارضت مع الالتزامات الأخرى التى يفرضها القانون الدولى العام ؟ ! وردت المحكمة على ذلك بالنفى . ثم عادت المحكمة إلى شرح ظروف تطبيق المادة ١٥ / ١ من الاتفاقية تفصيلا ، وأبانت فى هذا الصدد أن الإعلان الذى يجب أن تخطر به الحكومة — أى حكومة — السكرتير العام لمجلس أوروبا عن تطبيقها لنص المادة ١٥ / ١ من الاتفاقية ، يجب ألا يكون مجرد اخطار شكلى ، وإنما يجب أن يكون بياناً واضحاً يتضمن تفصيل هذه التدابير التى اتخذت بالفعل وأسبابها ومبرراتها . كما يجب أن يتم الأخطار فى بحر مدة معقولة من وقت اللجوء إلى استخدام التدابير التى تخالف الالتزامات المبينة بالاتفـــاقية[٢].

٥ — القيود التى تبيحها المادة ٦٤ من الاتفاقية بشأن إجازة التحفظ الذى يمكن لدولة من الدول الأعضاء فيها أن توررده بصدد عدم نفاذ حكم من أحكامها لا يتمشى مع القوانين المعمول بها فى أراضيها . واشترطت المادة ٦٤

(١) *Ibid ;* Council of Europe, *op. cit.*

(٢) *Ibid.*

لإجازة التحفظ أن يتضمن عرضاً موجزاً للقانون المشار إليه ، وأن لا يكون ذا صفة عامة ، أي ألا يتعلق بعموم الاتفاقية ولكن بنص معين فيها .

وقد انتقد هذا النص نقداً شديداً ، لأنه يتيح للدول الأعضاء أن تتهرب من الرقابة الدولية على تنفيذ الاتفاقية فى بعض بنودها . ومن ثم فان تعدد التحفظات قد يعرض الاتفاقية ككل للضعف والانهيار . ولكن من حسن الحظ أن الدول نفسها لم تلجأ إلى استخدام هذا النص كثيراً . فمجموع التحفظات التى أعلنتها الدول بموجب نص المادة ٦٤ المشار إليها لم تعدُ حتى الآن تسعة تحفظات ، منها أربعة خاصة بنص المادة ٢ من بروتوكول ٢٠ مارس سنة ١٩٥٢ ، وهو النص الخاص بحرية الآباء فى تربية وتعليم أبنائهم وفقاً لعقائدهم الدينية والفلسفية . وإلى جانب ذلك هناك مثلا تحفظان للنمسا ، أحدهما بشأن نص المادة ٥ من الاتفاقية (بشأن الحرية الجسمانية للفرد فى عدم القبض عليه أو حبسه إلا بالطرق القانونية) والمادة الأولى من البروتوكول السابق (بشأن حق الملكية) ، وتحفظ للنرويج بشأن المادة ٩ بصدد الحرية الدينية . هذا فضلا عن أن بعض هذه التحفظات لم ينفذ نتيجة عدم توافر الشروط التى يتطلبها نص المادة ٦٤ ولا سيما فيما يتعلق بكونها تشير إلى عدم التمشى مع القانون الوطنى بصفة عامة[1] .

هذا من ناحية ، ومن ناحية أخرى قامت اللجنة من حيث المبدأ بتحقيق الغرض الذى استهدفته الاتفاقية من نص المادة ٦٤ وغرض الدولة من التحفظ فى ضوئه على أساس قيام ضرورات تشريعية أو إدارية استدعت القيام بالتحفظ[2] .

وأخيراً ، تجدر الإشارة إلى أن التحفظ فى ضوء المادة ٦٤ كان مقيداًفى بعض الأحيان ، بحيث أتاح للدولة المتحفظة فرصة إعادة النظر فى قوانينها

(١) انظر نصوص هذه التحفظات فى *Annuaire, op. cit.*, I, pp. 40-45 ; II, pp. 89-91.

(٢) انظر فى هذا الشأن *Ibid*, II, p. 400 ; IV, p. 357.

التى لا تتمشى مع نص فى الاتفاقية . وهذا ما فعلته النرويج على سبيل المثال حيث ألغت النص الدستورى الذى كان يحرم على الجزويت عدم دخول أراضيها ؛ ومن ثم فقد أصبح تحفظها بصدد المادة ٩ من الاتفاقية غير ذى موضوع .

تنفيذ الاتفاقية الأوروبية على الصعيد الوطنى :

وهذه خطوة أولية يجب اللجوء فيها إلى القضاء الوطنى للدول المنضمة للاتفاقية قبل اللجوء إلى إجراءات الحماية الدولية للحقوق والحريات التى تضمنها الاتفاقية أمام اللجنة الأوروبية لحقوق الإنسان والمحكمة الأوروبية لحقوق الإنسان .

فالمادة ٢٦ من الاتفاقية الأوروبية تنص على ما يأتى : « لا يجوز الالتجاء للجنة إلا بعد إستنفاد جميع طرق الطعن الداخلية وفقاً لمبادئ القانون الدولى المقررة بوجه عام وفى خلال ستة أشهر ابتداء من تاريخ صدور القرار الداخلى النهـــائى » .

ولا يهمنا فى هذا الصدد أن نتعرض إلى تفصيل فى شأن استنفاد اجراءات التقاضى المحلية بشأن الحقوق التى تعترف بها الدول الأعضاء فى الاتفاقية ، والأساس القانونى لقيام هذا المبدأ الدولى والحدود التى استقر عليها العرف والعمل فى تطبيقه[1] ، قدر ما يهمنا الأشارة إلى الأسلوب الذى يستطيع عن طريقه الشاكى أن يعتمد على تنفيذ نصوص الاتفاقية فى النظام القانونى الداخلى للدول الأعضاء من أجل الحصول على حقه قبل لجوئه إلى أجهزة الضمان الجماعى والحماية الدولية لهذه الحقوق .

وواضح أن هذا الوضع يعتمد أساساً على المركز القانونى للاتفاقيات والمعاهدات الدولية فى النظام الدستوري الداخلى للدول الأعضاء ، أو إن

(١) انظر فى تفصيل ذلك Pinto, *op. cit.*, pp. 147-156.

شئت فقل أنه يعتمد بالأصح على تكييف العلاقة بين القانون الدولى وبين القانون الوطنى فى كل دولة تطبيقاً لمذهب وحدة القانونين أو ثنائيتهما .

فاذا كان دستور الدولة يتيح لمحاكمها الوطنية أن تطبق المعاهدات المصدق عليها بطريقة شرعية فى أقليمها دون حاجة لاصدار تشريع داخلى لنفاذها ، فان هذه المحاكم تصبح ملزمة بتطبيق الاتفاقية الأوروبية وحماية الحقوق المنصوص عليها فيها بصورة مباشرة . ومن قبيل هذه الدول ألمانيا الاتحادية والنمسا وإيطاليا واليونان وبلجيكا وهولندا وقبرص[1] . مثلا :

١ – فى ٢٥ أكتوبر سنة ١٩٥٦ أصدرت محكمة برلين الإدارية الفيدرالية حكماً يلغى أمر الطرد الصادر ضد أجنبى بلجيكى Lebeau Case وفقاً لقانون سنة ١٩٣٨ الذى يبيح منع الأجانب المتهمين بارتكاب الجرائم من الأقامة بألمانيا . وأسست المحكمة حكمها على أن نص القانون المذكور يتعارض مع نص المادة ٨ من الاتفاقية الأوروبية الذى يقرر حق احترام الحياة العائلية حيث أن هذا البلجيكى متزوج من ألمانية . وذلك لأن ص المادة ٥٩ من الدستور الألمانى يجعل للاتفاقات الدولية قوة القانون بين أطرافها ، بحيث تعلو فى التطبيق على تشريعات الولايات الداخلة فى الاتحاد الفيدرالى لألمانيا الغربية ، وتنسخ ما يتعارض مع أحكامها من هذه التشريعات[2] .

٢ – يذهب دستور هولندا إلى مدى أبعد من ذلك ، حيث يقرر أن نصوص المعاهدات والاتفاقات الدولية التى تصبح المملكة الهولندية طرفاً فيها ، أياً كان الوقت الذى تدخل فيه حيز التنفيذ ، تعلو على القانون الوطنى وكذلك الدستور الهولندى (حكم محكمة استئناف أرنهيم فى ٨ مارس سنة ١٩٦١)[3] .

---

(١) انظر فى تفصيل ذلك Vasak, *op. cit.*, pp. 236-244.

(٢) P. Modinos, Effects and Repercussions Of The European Convention, *The International and Comparative Law Quarterly*, Oct., 1962, p. 1103 ; L. Beaufort, Some Remarks About The European Convention For The Protection of Human Rights, *Netherlands International Law Review*, July, 1959, p. 44.

(٣) *Ibid*, p. 1103 ; *Ibid*, p. 45 .

أما إذا كان النظام الدستورى للدولة يشترط لنفاذ المعاهدات والاتفاقات الدولية فى إقليم الدولة أن يصدر بها تشريع داخلى ، فان المحاكم الوطنية تصبح غير مختصة بتطبيق نصوص الاتفاقية الأوروبية بمجرد انضمام الدولة إليها أو التصديق عليها ونشرها . فنفاذ الاتفاقية فى النظام القانونى الوطنى يتوقف فى هذه الحالة على تعديل نصوص التشريعات الداخلية ، بحيث يتبنى التشريع الوطنى أحكام الاتفاقية الأوروبية . فاذا لم تقم السلطات الوطنية باتمام هذه الخطوة ، فان المحاكم الوطنية تصبح فى حل من تطبيق نصوص الاتفاقية ، لأن إصدار قانون داخلى بتطبيق أحكام الاتفاقية إنما يتوقف على الخطوات التى تتخذ ووسائل حل التعارض بين أحكام الاتفاقية التى سوف تصبح بمثابة قانون داخلى وبين التشريعات الداخلية الأخرى[1]. وقد لجأت النرويج إلى الاجراء العملى فى هذا الصدد عندما دعت برلمانها إلى اجراء التعديلات الضرورية فى التشريع الداخلى ، وإصدار تشريع جديد يضمن تبنى نصوص الاتفاقية فى نظامها القانونى الوطنى قبل أن تتخذ الاجراءات بشأن التصديق على الاتفاقية . وبدون ذلك لم يكن بجدى أن يحاول الشاكى الاحتجاج بنصوص الاتفاقية الأوروبية كلما قام تعارض بين نصوصها والتشريعات الوطنية القائمة لا يمكن للقاضى الوطنى أن يوفق بينهما فيه عند التفسير ، ولا سيما إذا كان التشريع الوطنى لاحقاً على الاتفاقية .[2]

ومن قبيل البلاد التى تأخذ بهذا الاتجاه من أطراف الاتفاقية الأوروبية ، المملكة المتحدة والنرويج وأيرلندا وايسلندا والدانمرك والسويد وتركيا[3]. ومن الأمثلة المعروفة فى هذا الصدد حكم المحكمة الأيرلندية العليا فى ١٨ أكتوبر سنة ١٩٥٧ ، حيث ادعى الشاكى مخالفة قانون سنة ١٩٤٠ لنص المادة ٥ من الاتفاقية الأوروبية بشأن حق كل إنسان فى الحرية والأمان . وجاء فى حيثيات الحكم : « على الرغم من أن المحكمة تقبل المبدأ الذى يقرره

(١) Pinto, *op. cit.*, p. 14 ; Beaufort, *op. cit.*, p. 45.
(٢) Pinto, *op. cit.*, p. 144.
(٣) Vasak, *op. cit.*, pp. 245-247.

ماكسويل من أنه يجب تفسير وتطبيق كل قانون بالقـــدر الذى تتيح له صياغته أن لا يتعارض وما انتهت إليه الأسرة الدولية ومبادئ القانون الدولى ، فان المحكمة ترى أن تفسيرها لهذا القانون لن يؤدى إلى حل التعارض بين نصوصه ونص المادة الخامسة من الاتفاقية الأوروبية . . . ومن ثم يجب التعرض للموضوع على أساس قيام هذا التعارض . . . وبصرف النظر عن وجود أى نص فى الدستور ، فأنه من الواضح أن قواعد القانون الدولى لا تشكل جزءاً من القانون الوطنى ، إلا فى الحالات التى يقرر فيها التشريع وأحكام القضاء والعادات المرعية ذلك ... فعلى الرغم من أن الدولة طرف فى الاتفاقية ، إلا أنه من الواضح أن هذه الاتفاقية لا يمكن لها بذاتها وبأى حال من الأحوال أن تكيف أو تؤثر فى تشريعنا الوطنى . فحيث يكون هناك تعارض لا يمكن التوفيق بشأنه بين قانون وطنى وبين مبادئ القانون الدولى أو نصوص اتفاقية دولية فان المحاكم التى تقوم بدورها فى تطبيق القانون الوطنى يجب أن تقوم بتنفيذ هذا القانون »[1].

ومن ثم فان الفقه بالنسبة لهذه البلاد الأخيرة يعطى أهمية كبرى لقبولها اختصاص اللجنة الأوروبية لحقوق الإنسان لنظر شكاوى الأفراد وجماعاتهم ، ممن لم يتوصلوا إلى نيل حقوقهم بالرجوع إلى اجراءات التقاضى المحلية . وقد كانت أيرلندا بالفعل من بين الدول التى قبلت حق الفرد فى الشكوى أمام اللجنة والتى قبلت الاختصاص الإلزامى للمحكمة الأوروبية لحقوق الإنسان فى هذا المجال .

غير أنه لا تفوتنا الإشارة ، من ناحية أخرى ، إلى أن الدول أعضاء الاتفاقية من أصحاب الاتجاه الأخير فى الأخذ بمذهب ثنائية القانونين هى ملزمة بموجب نصوص الاتفاقية وأحكام القانون الدولى العام باجراء التعديلات الضرورية فى تشريعاتها الداخلية بما يضمن تنفيذ أحكام الاتفاقية الأوروبية . فالمادة الأولى من الاتفاقية الأوروبية تنص على ما يأتى : « تعترف الأطراف السامية

(١) Beaufort, *op. cit.*, 45 ; Pinto, *op. cit.*, p. 144.

المتعاقدة لكل إنسان يخضع لقضائها بالحقوق والحريات المحددة فى الباب الأول من هذه الاتفاقية » . ومفاد هذا النص أن لكل شخص يخضع لاختصاص الأطراف السامية المتعاقدة الحق فى الاعتراف بحقوقه وحرياته التى تضمنها وتنص عليها الاتفاقية وملحقاتها . ومفاد ذلك أيضاً أن هذا الشخص يستطيع أن يطالب بهذه الحقوق أمام المحاكم الوطنية أولا ، بصرف النظر عن المركز الدستورى للاتفاقية داخل كل بلد من البلاد الأعضاء فيها . وتشير الأعمال التحضيرية إلى أن هذا هو ما قصده واضعو الاتفاقية من النص، حيث أنهم رفضوا إضافة فقرة مؤداها أن على المشرع الداخلى فى الدول أعضاء الاتفاقية أن يضمن التنفيذ الكامل للباب الأول من الاتفاقية (الخاص بمضمون الحقوق والحريات) فى أنظمتها القانونية الداخلية . فقد اعتبر أنه من الطبيعى أن تقوم الدول الأعضاء بذلك من تلقاء نفسها ودون حاجة لنص[1]. كذلك تنص المادة ٥٧ من الاتفاقية على ما يأتى : « تقدم كل دولة سامية متعاقدة بناء على طلب السكرتير العام لمجلس أوروبا البيانات التى تطلب منها عن الطريقة التى يكفل بها قانونها الداخلى تطبيق جميع أحكام الاتفاقية تطبيقاً فعالا » .

ومما لا شك فيه أن هذا مبدأ من مبادئ القانون الدولى العام ، قرره الرأى الاستشارى للمحكمة الدائمة للعدل الدولى بشأن تبادل السكان بين تركيا واليونان ، حيث جاء فى هذا الرأى : « أن الدولة التى ترتبط بالتزامات تعاقدية دولية صحيحة ، تصبح ملزمة بأن تجرى فى تشريعاتها التعديلات الضرورية لضمان تنفيذ الالتزامات الواقعة فى كنفها »

وفى ضوء هذا المبدأ ، وعلى أساس نص المادة الأولى من الاتفاقية وما تتطلبه المادة ٥٧ من اعتبارات عملية ، قامت دول عديدة من أطراف الاتفاقية الأوروبية بتعديل تشريعاتها الداخلية ، بما يتفق وتنفيذ الاتفاقية فى ضمان الحقوق والحريات المنوه عنها . ومن قبيل ذلك أن النرويج قد عدلت سنة ١٩٥٣ قانوناً اجتماعياً كان يتعارض ونص المادة ٥ من الاتفاقية .

(١) Beaufort, *op. cit.*, p. 46.

كذلك عدلت النرويج نص المادة السابق الإشارة إليها من دستورها والتى كانت تمنع الجزويت من دخول أراضيها . وقدقامت تركيا بتعديل عدد من قوانينها وإصدار تشريعات وقوانين جديدة تضمن الاعتراف وترعى تنفيذ الحقوق التى تحميها الاتفاقية الأوروبية[1].

ولكن مهما يكن الأمر فى شأن وجهة نظر المشرع الوطنى والمحاكم الوطنية فى شأن تنفيذ الاتفاقية الأوروبية على الصعيد الوطنى ، فان أهمية هذه الاتفاقية تكمن أولا وأساساً فى إنشاء قواعد وأجهزة الضمان الجماعى والحماية الدولية للحقوق المعترف بها فى صلبها . ذلك أن فشل دولة فى إصدار تشريع بتبنى أحكام الاتفاقية وتنفيذها ، أو عدم قيام محاكمها بتغليب نصوص الاتفاقية عند التعارض بين أحكامها وبين القانون الوطنى[2] ، يستدعى تقديم الشكوى أمام الجهاز الدولى للرقابة على تنفيذ الاتفاقية وحماية الحقوق والحريات المعينة بها .

دور اللجنة الأوروبية لحقوق الانسان فى تحقيق الحماية الدولية لتنفيذ الاتفاقية :

وتنفيذاً للمبدأ السابق الإشارة إليه بعدم إمكان أية دولة التحلل من الوفاء بالتزاماتها التعاقدية الدولية بسبب مخالفتها لأحكام القوانين المعمول بها فى أراضيها ، إلافى حدود القيود والتحفظات الخاصة السابق إيضاحها عند الحديث عن نطاق تطبيق الاتفاقية ، أنشأت الاتفاقية الأوروبية ثلاث أجهزة دولية مستقلة لكفالة تنفيذ أحكامها وضمان احترام الحقوق والحريات الواردة بها ، كضمان نهائى لواجب الحماية الذى تفرضه الاتفاقية على الدول الأعضاء فى نطاق أنظمتها القانونية الوطنية ، أو إن شئت فقل بعد استنفاد كافة

---

(١) *P.C.I.J. Series B.*, No. 10, 1925, p. 20.

(٢) انظر من أمثلة التعارض بين أحكام المحاكم الوطنية وبين نصوص الاتفاقية أو قرارات أجهزتها وفروعها الدولية Vasak, *op. cit.*, pp. 247-250.

إجراءات التقاضى وطرق الطعن الداخلية[1]. هذه الأجهزة أو الفروع الثلاثة لوسائل الحماية الدولية هى :

(أ) اللجنة الأوروبية لحقوق الإنسان (المادة ١٩ من الاتفاقية).

(ب) المحكمة الأوروبية لحقوق الإنسان (المادة ١٩ من الاتفاقية).

(ج) لجنة الوزراء (المادتان ٣١ ، ٣٢ من الاتفاقية).

وتفيد الأعمال التحضيرية للاتفاقية (فى مناقشات الجمعيةالاستشارية لمجلس)أوروبا أن الوصول إلى إنشاء الأجهزة الثلاثة باختصاصاتها المختلفة ، إنما جاء نتيجة المساعى التى بذلت للتوفيق بين وجهات نظر الدول فى هذا الصدد . فالبعض لم ير بأساً فى أن يمارس الفرد حقه فى حماية حرياته السياسية بنفسه وبصورة مباشرة أمام محكمة دولية تنشأ فى أوروبا الغربية خصيصاً لهذا الغرض ، وبمعنى أصح أن يصبح الفرد شخصاً من أشخاص القانون الدولى العام . وقالوا فى هذا الصدد أن قيام العدالة بلا تدوين لمجموعة من الأحكام القانونية هو أقرب لتحقيقها من وجود هذه المجموعة من الأحكام والقواعد التى لم تتوفر لها محكمة مختصة للقيام بتفسيرها وتطبيقها والفصل فى المنازعات التى تنشأ طبقاً لها .

"A law without a court is worse than no law at all."

هذا بينما أراد البعض الآخر أن يقصر مبدأ الرقابة الدولية على الدول وحدها دون الأفراد أو جماعاتهم، وعلى أن يتم ذلك بتقديم الطلب أمام اللجنة التى تقوم باجراء التحقيق والتوفيق بين أطراف النزاع ، دون الخضوع لحكم بات أو ملزم عن طريق محكمة دولية تنشأ خصيصاً لهذا الغرض[2].

(١) انظر شروط ذلك فى Pinto, *op. cit.*, pp. 236-244.

وانظر فى صدد رفض اللجنة لبعض الشكاوى التى لم تستنفد هذه الاجراءات بدعوى أن اللجوء إلى طرق الطعن الختامية عديم الجدوى بالنسبة للشاكى ، الشكوى رقم ١٤٨٨ / ٦٢ المقدمة من بلجيكى ضد بلجيكا والشكوى ١٧٣٩ / ٦٢ المقدمة من شخص لا وطن له ضد السويد (قرارى اللجنة فى ١٨ ديسمبر سنة ١٩٦٣ وفى ٢ مارس ١٩٦٤).

Collection Of Decisions Of The European Commission, No. 13, pp. 96, 102.

(٢) P. Modinos, *op. cit.*, p. 1099.

ومن ثم انتهى واضعو الاتفاقية إلى حل وسط مؤداه أن تنشأ اللجنة الأوروبية لحقوق الإنسان للقيام بمهمة تمهيدية فى تلقى طلبات الدول الأعضاء وشكاوى الأفراد (ضد الدول التى تقبل اختصاص اللجنة فى هذا الخصوص) ومحاولة التحقق من جديتها ثم الوصول إلى حل ودى بشأنها ، قبل إحالتها للبت فيها بصفة نهائية أمام لجنة الوزراء أو المحكمة الأوروبية لحقوق الإنسان (بالنسبة للدول التى تصرح بقبولها اختصاصها) . وعلى هذا الأساس تحدد دور اللجنة منذ قيامها بعملها إثر انتخاب أعضائها فى ١٨ مايو سنة ١٩٥٤ [١] فى الآتى :

أولا : تلقى الطلبات التى تتقدم بها دولة من الدول أعضاء الاتفاقية بواسطة السكرتير العام لمجلس أوروبا ، بشأن أية مخالفة لأحكام الاتفاقية الأوروبية ترى امكان اسنادها إلى دولة أخرى متعاقدة ، سواء فى ذلك أضرت المخالفة أو وقع العدوان على حق أو حرية من حقوق وحريات رعايا الدولة الشاكية أم على حق أو حرية من حقوق وحريات رعايا الدول الأخرى ، بما فى ذلك رعايا الدول غير الموقعة على الاتفاقية أو من لا وطن أو جنسية لهم (المادة ٢٤ من الاتفاقية) . وهذا هو ما حدث بالفعل . فقد تلقت اللجنة ثلاث شكاوى من الدول الأعضاء ، اثنتان من اليونان خاصتان بقبرص والثالثة من النمسا . ومن بين هذه الشكاوى الثلاثة اثنتان لا تتعلقان برعايا الدولة المتدخلة ، وهما الطلب رقم ٢٩٩ / ٥٧ المقدم من الحكومة اليونانية ضد بريطانيا بشأن حقوق وحريات ٤٩ قبرصياً ، والطلب رقم ٢٨٨ / ٦٠ المقدم من الحكومة النمساوية ضد إيطاليا بسبب اضطهاد وانكار العدالة لستة من سكان التيرول الجنوبى فى إيطاليا ممن يتكلمون الألمانية [٢] .

وقد قصد واضعوا الاتفاقية بذلك إلى أمرين :

الأول : يتعلق بتأكيد مبدأ الرقابة الدولية والضمان الجماعى لحماية الحقوق

---

(١) وهو نفس تاريخ دخول البروتوكول الأول حيز التنفيذ

) Vasak, *op. cit.*, p. 83 ; Pinto, *op. cit.*, p. 84.

(٢) Vasak, *op. cit.*, p. 96.

والحريات المنوه عنها ، بحيث تصبح كل دولة متعاقدة مسئولة عن احترام وحماية هذه الحقوق والحريات فى نطاق جميع بلاد الدول الأعضاء . وبمعنى أصح يكون تدخل الدولة المتعاقدة ومطالبتها بوجوب رعاية الحقوق والحريات لغير رعاياها لدى دولة أخرى متعاقدة (خلافاً للقواعد التقليدية فى القانون الدولى بشأن عدم التدخل فى علاقة دولة بالأشخاص التابعين لها) ليس مجرد حق للدولة المتدخلة أن تمارسه أو تنكل عنه ، وإنما هو واجب والتزام يقع على عاتق كل دولة من الدول الأطراف فى الاتفاقية أن تقوم به نيابة عن المجتمع الأوروبى بالنسبة للحقوق والحريات التى تحميها الاتفاقية وترعى كفالة تنفيذها كاملة غير منقوصة . وبعبارة أخرى يكون الأمر شبيها بحق كل دولة من الدول الأعضاء فى تحريك الدعوى العمومية . ويبين هذا أكثر وضوحاً فى حق كل من اللجنة والمحكمة الأوروبية فى أن ترفض تنازل الطرف الذى قام بتقديم الشكوى (فرداً كان أو دولة) عن الاستمرار فى الإجراءات ، لأن الأمر لم يعد بعد متعلقاً به وحده[1] .

وقد بدا هذا الرأي صريحاً للمحكمة لدى ابلاغها من قبل مندوبى اللجنة أمامها سحب دى بيكر De Becker ادعاءاته ضد الحكومة البلجيكية حيث أن كلا من اللجنة والمحكمة يؤديان دورهما فى خدمة الصالح العام[2] .

والأمر الثانى ، أن الدولة التى لا تقبل اختصاص اللجنة بنظر شكاوى الأفراد طبقاً للمادة ٢٥ من الاتفاقية ، لا تصبح بمنجاة من خرقها لهذه الحقوق والحريات التى تحمى عن طريق تدخل غيرها من الدول أعضاء الاتفاقية .

غير انه من الملاحظ أن الدولة التى تقوم بشكوى دولة أخرى وحمل عبء وتحريك الدعوى العمومية ضدها ، عادة ما تدعوها إلى ذلك أسباب خاصة وعلاقات وثيقة بالأفراد الذين وقع عليهم العدوان ، كأن يكونوا من رعاياها أو ممن تربطهم بها صلة الجنس أو الدين ، أو نتيجة الرغبة فى التدخل

(١) *Ibid*, pp. 96, 142, 182.

(٢) Vasak, *op. cit.*, p. 183.

لسوء العلاقة بين الدولتين أو بسبب الأطماع الاستعمارية كما كان يحدث قديماً في التخفي باسم التدخل لرعاية حقوق الإنسانية . ومن ثم فقد نشأت وجهة النظر القائلة بأنه من غير المحتمل أن تقوم إحدى الدول الأعضاء في الاتفاقية بالتدخل بالشكوى لصالح أجنبي لا علاقة أصلية لها به . كما نشأت وجهة النظر القائلة بأن قيام شكوى من هذا القبيل – وهو ما لم يحدث حتى الآن – لن تجد لها سنداً من لجنة الوزراء في اتخاذ قرار بأغلبية الثلثين بأدانة الدولة المشكو في حقها ، حتى بفرض أن اللجنة قد انتهت في تقريرها إلى ذلك[1] .

ثانياً : من ثم أصبح من الضروري أن يبيح نظام الضمان الجماعي الأوروبي للحقوق والحريات المنوه عنها حق الأفراد وجماعاتهم والمنظمات غير الحكومية في التقدم مباشرة إلى اللجنة بالشكوى لدى خرق أي من الدول المتعاقدة للحقوق المقررة في الاتفاقية ، ولكن متى كانت هذه الدولة قد صرحت باعترافها للجنة بهذا الاختصاص (المادة ٢٥ من الاتفاقية) .

ويعتبر هذا الإجراء من أهم الجوانب الثورية في الاتفاقية الأوروبية ؛ حيث أجاز لجميع الأشخاص الطبيعيين (أو أية منظمة غير حكومية أو أية جماعة من الأفراد) أياً كانت جنسياتهم ، بل لو كانوا من فاقدي الجنسية ، ويزعمون أن إحدى الدول المتعاقدة قد اعتدت على حقوقهم أو حرياتهم المقررة في الاتفاقية الأوروبية ، أن يتقدموا إلى اللجنة بالشكوى مباشرة (عن طريق توجيهها إلى السكرتير العام لمجلس أوروبا)[2] .

ومن قبيل هذه الحالات الشكوى التي قدمها شخص عديم الجنسية من أصل ليتواني إلى اللجنة ضد حكومة السويد (شكوى رقم ١٧٣٩ / ٦٢ وقرار اللجنة بتاريخ ٢ مارس سنة ١٩٦٤) ، وكذلك الشكوى الغريبة الوقائع التي قدمها محمد نزيه الكزبري السوري الجنسية ضد حكومة ألمانيا الفيدرالية (شكوى رقم ١٨٠٢ / ٦٣ وقرار اللجنة برفضها في ٢٦ مارس سنة ١٩٦٣) .

---

(١) Woldock, *R.D.C.*, *op. cit.*, p. 205.

(٢) Beaufort, *op. cit.*, p. 47.

وتبدو أهمية هذا الإجراء أولا ، فى كون اللجنة جهاز دولى محايد يشترط عملا لصلاحية أعضائه للانتخاب والتعيين بواسطة لجنة الوزراء نفس الشروط التى تتطلبها المادة ٣٩ / ٣ من الاتفاقية فى شأن قضاة المحكمة الأوروبية لحقوق الإنسان[١] ، مما جعل لها صفة شبه قضائية ، ومتع أعضاءها بروح التجرد والنزاهة فى البحث عن حل سليم والتوفيق بين الأطراف المتنازعة على أساس الرعاية الصحيحة لروح الاتفاقية وتنفيذ أحكامها . وثانياً ، من حيث أن اللجوء إلى اللجنة هو مقدمة للسير فى مجموعة من الإجراءات الأخرى التى توفر الوصول إلى حل فعلى للنزاع والبت فيه بصفة نهائية ، إما عن طريق التسوية السياسية أمام لجنة الوزراء أو بحكم قضائى أمام المحكمة الأوروبية لحقوق الإنسان ، ما لم توفق هى (اللجنة الأوروبية لحقوق الإنسان) فى التوصل إلى تسوية ودية بشأنه (المواد ٣٠ ، ٣١ ، ٣٢ ، ٤٧ من الاتفاقية) .

وهكذا أصبحت اللجنة بمثابة المحرك الأساسى لنظام الضمان الجماعى الذى أنشأته الاتفاقية . فهى تقوم بمهمة تمهيدية فى تلقى الطلبات المقدمة من الدول الأعضاء عن مخالفة أحكام الاتفاقية ، وتقوم باعلان الدولة المشكو بحقها عن طريق السكرتير العام لمجلس أوروبا عن الشكوى حتى تتمكن من ابداء ملاحظاتها بشأنها كتابة تمهيداً للتصويت بأغلبية الحاضرين من أعضاء اللجنة

---

(١) انظر فى هذا الشأن

D. Bowett, *The Law Of International Institutions,* 1963, p. 238.

ويبدو هذا أكثر وضوحاً بالرجوع لنص المادة ٢٣ من الاتفاقية والتى تنص على أن « يؤدى أعضاء اللجنة أعمالهم بصفتهم الفردية » – أى باعتبارهم ليسوا ممثلين لدولهم ، وتنص المادة ٣٩ / ٣ فى شأن القضاة على كونهم يتمتعون بأعلى قدر من الاعتبار الأدبى ، كما تتوافر فيهم الشروط اللازمة لمزاولة الوظائف القضائية العليا وأن يكونوا من ذائعى الشهرة فى القانون . وهى شروط تزيد على الشروط التى تتطلبها اتفاقية لاهاى سنة ١٩٠٧ (المادة ٤٤) فى شأن المحكين ولكنها تتفق والشروط التى يضعها النظام الأساسى لمحكمة العدل الدولية فى شأن القضاة (المـــادة ٢) .

حول قبولها[1] . وفيها تتركز عرائض الأفراد وشكاواهم للانتصاف من خرق الحقوق والحريات المقررة لهم ، فتقوم بفحصها (عن طريق لجنة فرعية من ثلاثة من أعضائها) للتحقق من جديتها . وعلى هذا الأساس قد تتخذ اللجنة قرارها باستبعاد شكوى الفرد (المقدمة إليها طبقاً للمادة ٢٥ من الاتفاقية) إذا بدت لأول وهلة *prima facie* أنها غير قائمة على مبررات معقولة أو اعتبرتها غير مقبولة بالنظر لإحدى الأحوال المنصوص عليها فى المادة ٢٧ من الاتفاقية[2] . كما قد تتخذ اللجنة قرارها بنظر النزاع وتشرع فى فحصه ومحاولة الوصول إلى حل ودى عن طريقها بشأنه[3] ، أو أن تهيئ سبيل إعداد عناصره (فى تقرير تسجل فيه الوقائع وتبدى رأيها فى المخالفة المنسوبة إلى الدولة المشكو فى حقها) من أجل استصدار حكم بات فيه باحدى الوسيلتين المنوه عنهما[4].

وهنا تجدر الإشارة إلى أن اللجنة فى الفترة ما بين ٥ يوليه سنة ١٩٥٥ (وهو تاريخ بدئها مباشرة الاختصاص بقبول شكاوى الأفراد عندما أعلنت ست دول عن ذلك طبقاً للمادة ٢٥ / ٤ من الاتفاقية)[5] وبين ١٧ أكتوبر سنة ١٩٦٢ ، قد تلقت ١٥٠٠ شكوى من الأفراد ، قررت قبول سبعة منها فحسب[6] .

---

(١) المادة ٤٤ من لائحة إجراءات اللجنة والمادة ٣٤ من الاتفاقية ؛
Ganji, *op. cit.*, p. 239.

(٢) كأن لم يكن موقعاً عليها من الشاكى ، أو سبق للجنة فحصها ، أو سبق تقديمها لهيئة دولية أخرى ، أو لم تستنفد بشأنها إجراءات وطرق الطعن الداخلية . . الخ — انظر
Ganji, *op. cit*, p. 242.

(٣) قضى التعديل الذى أدخله البروتوكول الثالث (الموقع فى ٦ مايو سنة ١٩٦٣) على المادة ٢٩ من الاتفاقية عدم جواز رجوع اللجنة عن قرارها بقبول شكاوى الأفراد ورفضها لها على أساس إحدى الاعتبارات المنصوص عليها فى المادة ٢٧ من الاتفاقية إلا بالاجماع .

(٤) انظر Pinto, *op. cit.*, p. 184.

(٥) سبقت الإشارة إلى أن عدد هذه الدول التى قبلت اختصاص اللجنة بقبول شكاوى الأفراد بلغت عشر دول — انظر ص ١٢٥ .

( ) *Second Conference Of The European Ministers Of Justice*, Council Of Europe, 1963, p. 44.

وقد أرسى فقه اللجنة فى هذا الصدد عدة مبادئ تجدر الإشارة إلى أهمها :

١ – اعتبرت اللجنة أن اتخاذ إحدى الدول المتعاقدة والتى أعلنت عن قبولها اختصاص اللجنة بنظر شكاوى الأفراد، أى إجراء أو تدبير يكون من شانه أن يعرقل مزاولة هذا الحق مزاولة فعالة ، مما يجيز لهؤلاء الأفراد حق التقدم بالشكوى من هذا الإجراء الذى يعتبر اعتداء على حق من الحقوق التى تضمنها الاتفاقية فى المادة ٢٥/١ منها (قرار اللجنة فى ٢٠ مارس سنة ١٩٥٨ وقرارها فى ٩ يوليو سنة ١٩٥٩) [١] .

٢ – اتجهت اللجنة فى قراراتها الأولى إلى التوسع فى مفهوم الشخص الطبيعى والمنظمات غير الحكومية وجماعات الأفراد ممن يجوز لهم تقديم الشكاوى بزعم أن إحدى الدول المتعاقدة والتى صرحت بقبول اختصاص اللجنة فى هذا الصدد قد اعتدت على حقوقهم وحرياتهم المقررة لهم فى الاتفاقية الأوروبية . فرأت فى بادئ الأمر أن المادة ٢٥ من الاتفاقية لم تعن بذلك الأفراد أو الأطراف الذين لحقهم الضرر بصورة مباشرة فحسب، وإنما تستطيع اللجنة أن تنظر كذلك شكاوى من لحقهم ظلم أو عدوان من جراء خرق هذه الحقوق أو الحريات بصورة غير مباشرة، كبعض أصحاب القرابة القريبة أو من كانت له مصلحة شخصية قائمة وصحيحة فى تصحيح الخطأ[٢]. ولكن اللجنة عادت فى قراراتها الأخيرة فوضعت عدة مبادئ واعتبارات مؤداها التضييق من نطاق هذه الإباحة . مثال ذلك أنها قررت أن ليس لمن لم يكن طرفاً فى نزاع صدر حكم بشأنه من قبل المحاكم الوطنية أن يدعى كونه طرفاً مضاراً له حق تقديم الشكوى أمام اللجنة[٣]. كما قررت رفض نظرية العدوان المحتمل على الحقوق

---

(١) *Annuaire, op. cit.*, II, p. 337 ; Vasak, *op. cit.*, pp. 94, 97.

(٢) *Annuaire, op. cit.*, I., p. 166 ; Berthold Goldman, Human Rights Tribunals, *Les Juridictions Internationales* (Union Internationale des Avocats), Dalloz et Sirey, Paris, 1958, pè 83.

(٣) *Annuaire, op. cit.*, I, p. 164 ; II, p. 286.

والحريات المقررة فى الاتفاقية نتيجة قيام قانون وطنى تتعارض نصوصه مع أحكام الاتفاقية، ما دام هذا الخرق أو العدوان لم يقع بالفعل على أحد الأفراد أو الهيئات غير الرسمية التى لها حق الشكوى. فاللجنة غير مختصة بنظر التوافق أو التعارض بين قانون وطنى وبين الاتفاقية الأوروبية نظرياً أو بصفة مجردة *in abstracto* ، ولكنهـــا تستطيع أن تقرر وجهة نظرها فى صدد مخالفته لأحكام الاتفاقية عند تطبيقه على أحد الأشخاص الطبيعيين أو الهيئات غير الرسمية مولداً خرقاً أو عدواناً على الحقوق والحريات المقررة لهم . ومن ثم فقد قررت عدم قبول الشكوى المقدمة من أحد الأفراد احتساباً أو نيابة عن الآباء والأمهات من الأبرياء للاحتجاج عن قيام القانون النرويجى الذى يجيز الاجهاض فى بعض الحالات . كما قررت رفض شكوى الزوجة صاحبة الذمة المالية المنفصلة من حرمانها حقها فى الانتفاع بأموالها طبقاً للمادة الأولى من البروتوكول بسبب حبس زوجها المحامى البلجيكى وحرمانه من ممارسة مهنتـــه[1] .

٣ ــ يجب أن تؤسس الشكوى من خرق الحقوق والحريات المعترف بها فى الاتفاقية وملحقاتها ، على وقائع قامت بعد نفاذ الاتفاقية أو ملحقاتها من البروتوكولات بالنسبة للدولة المتعاقدة المشكو فى حقها .غير أنه يجوز أن تؤسس الشكوى على وقائع قامت قبل نفاذ الاتفاقية أو ملحقاتها بالنسبة لهذه الدولة، ولكنها ما زالت تنتج آثارها فى خرق الحقوق والحريات التى تضمنها بعد تاريخ هذا النفاذ . ومع ذلك فان هذا القيد يبدو نظرياً بحتاً ، ما دامت الشكوى لا يمكن تقديمها إلا بعد استنفاد كافة وسائل الطعن الداخلية ، أو بالأحرى بعد قيام الوقائع المشار إليها بمدة طويلة كما ستأتى الإشارة .

٤ ــ اتجه فقه اللجنة إلى وجوب مراعاة الظروف الاستثنائية أو غير

(١) *Annuaire, op. cit.*, III, p. 125 ; IV, p. 271 ; Vasak, *op. cit.*, p. 98 ; *Collection Of Decisions Of The European Commission*, No. 13, p. 89 ; Ganji, *op. cit.*, p. 240 ; Pinto, *op. cit.* p. 173.

الطبيعية التى تحول بين الشاكى وبين استنفاد كافة إجراءات الطعن والتقاضى الداخلية قبل تقديم الشكوى إليها ، كما لو كان من المؤكد أن المحاكم الوطنية ستقضى بحكم مخالف أو غير كاف لإنتاج الأثر الضرورى لتصحيح الوضع بوجوب رعاية الحقوق والحريات المعترف بها ، أو كان فى هذا اللجوء ما يجعل الشاكى عرضة للاضطهاد من قبل السلطات الوطنية . من ثم تملك اللجنة امكانية بحث هذه الظروف والاعتبارات التى تبرر عدم استنفاد إجراءات الطعن والتقاضى الداخلية كاملة وفقاً للقواعد الدولية المنتهى إليها فى هذا الخصوص [١].

٥ — يجب على الشاكى أن يتقدم بشكواه إلى اللجنة فى مدى ستة شهور من تاريخ صدور آخر قرار أو حكم أعلى درجة من المحاكم الوطنية التى يجوز لها نظر النزاع ، وفقاً للمادة ٢٦ من الاتفاقية . وقد استأنس فقه اللجنة فى هذا الصدد بالرأى الاستشارى للمحكمة الدائمة للعدل الدولى (فى ٧ فبراير سنة ١٩٢٣ بخصوص مراسيم الجنسية فى تونس ومراكش) من حيث عدم التوسع فى تفسير الأجل الذى وضعته المادة ٢٦ من الاتفاقية فى هذا الصدد . وارتأت اللجنة فى ذلك أن بدأ مدة الستة الشهور يجب ألا يسبق قبول الدولة المشكو فى حقها اختصاص اللجنة فى نظر شكاوى الأفراد ، بصدد شكاوى هؤلاء الأفراد أو جماعاتهم أو المنظمات غير الحكومية [٢]. ولكنها رأت فى صدد قضية دى بيكر De Becker عدم الاعتداد بهذا الأجل، ما دامت الظروف التى حالت بين الشاكى وبين مباشرة حقه فى اللجوء إلى قضاء دولته (بلجيكا) ما زالت

---

(١) *Annuaire, ibid,* p. 214 ; Ganji, *op. cit.,* p. 241 ; Vasak, *op. cit.,* pp. 125-126 ; Pinto, *op. cit.,* pp. 154-156.

(٢) *Annuaire, op. cit.,* III (1960), pp. 234, 294 ; Ganji, *op. cit.,* p. 241 ; Waldock, The European Convention For The Protection Of Human Rights, *B.Y.I.L.,* Vol. 34, 1958, p. 361 ; Berthold Goldman, Human Rights Tribunals, *Les Juridictions Internationales* (Union Internationale Des Avocats), Dalloz Et Sirey, Paris, 1958, p. 91.

قائمة ، نتيجة صدور حكم عليه من قبل محكمة بروكسل العسكرية فى ١٤ يونيه سنة ١٩٤٧ بالسجن مدى الحياة لثبوت تعاونه مع قوات الاحتلال النازى ، ثم صدور عفو عنه فى ٢٢ فبراير سنة ١٩٥١ بشرط أن يمتنع عن الاشتغال بالسياسة وأن يغادر الأراضى البلجيكية إلى فرنسا فى مدى شهر من تاريخ الإفراج عنه . فبينما كانت بلجيكا قد قبلت اختصاص اللجنة بنظر شكاوى الأفراد ضدها فى ٥ يوليه سنة ١٩٥٥ ، تقدم دى بيكر فى ٤ سبتمبر سنة١٩٥٦ إلى اللجنة بالشكوى على أساس حرمانه من التمتع بالحقوق والحريات التى تضمنها له الاتفاقية فى المواد ٥ و ٧ و ١٠ منها . وقد قبلت اللجنة نظر شكوى دى بيكر على أساس أن الظروف التى حالت بينه وبين اللجوء إلى إجراءات ووسائل التقاضى الداخلية فى بلجيكا ، للمطالبة بحقوقه فى العودة إلى أراضيها وممارسة كافة الحقوق والحريات الأخرى التى حرم منها ، ما زالت قائمة ، وعلى أساس أن مدة الشهور الستة المحددة كأجل لقبول الشكوى بعد استنفاد إجراءات التقاضى الداخلية لا يمكن أن تبدأ إلا بزوال تلك الظروف التى وجد دى بيكر نفسه فيها . هذا فضلا عن أن دى بيكر قد تقدم بشكواه إلى اللجنة فى بحر مدة معقولة من تاريخ قبول بلجيكا اختصاص اللجنة بنظر شكاوى الأفراد ، طبقاً للقاعدة العامة المعمول بها فى اجراءات التقاضى الدولية ، والتى تحكم مثل هذه الحالات حيث لا يمكن تطبيق نص خاص بمدة محددة[1] .

٦ — اتجهت اللجنة إلى رفض الشكوى التى سبق لها فحصها إذا لم يتأيد نظرها من جديد بظهور وقائع جديدة ، بحيث تبدو الشكوى أو الطلب الجديد أهلا لإعادة النظر فيه . وعلى هذا الأساس تقوم اللجنة بفحص كل شكوى يطلب إليها إعادة النظر فيها ، من حيث أطراف النزاع وموضوعه وأسبابه . وفى ضوء هذه الشروط الموضوعية تقرر اللجنة ما إذا كان الطلب المقدم إليها ينطوى على وقائع جديدة (لا مجرد معلومات جديدة) تجعل الطلب

---

(١) *Annuaire, op. cit.,* II, p. 245 ; Pinto, *op. cit.,* p. 175 ; Vasak, *op. cit.,* p. 131.

مقبولا لإعادة النظر فيه ، أم لا يعدو أن يكون موضوعه نفس موضوع الشكوى السابق نظرها واتخاذ قرار بشأنها[1].

تشكيل المحكمة الأوروبية لحقوق الإنسان :

فى ٣ سبتمبر سنة ١٩٥٨ كانت ثمان دول أعضاء فى الاتفاقية الأوروبية قد صرحت بقبولها الاختصاص الإلزامى للمحكمة الأوروبية لحقوق الإنسان فيما يتعلق بنظر جميع المسائل ذات العلاقة بتفسير وتطبيق هذه الاتفاقية دون حاجة إلى اتفاق خاص (المادة ٤٦ / ١ من الاتفاقية) . وقد وافق هذا التاريخ مرور خمس سنوات على دخول الاتفاقية حيز التنفيذ ، وأصبح على الجمعية الاستشارية لمجلس أوروبا أن تبدأ تشكيل المحكمة وانتخاب قضاتها من بين أسماء المرشحين الذين تقدمت بهم الدول أعضاء مجلس أوروبا فى قوائم تضم ثلاثة مرشحين لكل دولة ، منهم اثنين على الأقل من جنسيتها (المادة ٣٩ من الاتفاقية) ، وبشرط أن يكونوا ممن تتوافر فيهم نفس الشروط التى تضعها المادة ٢ من النظام الأساسى لمحكمة العدل الدولية بشأن قضاة هذه المحكمة . فقد نصت المادة ٣٩ /٣ من الاتفاقية الأوروبية فى هذا الشأن على أنه يلزم أن يكون المرشحون ممن يتمتعون بالصفات الخلقية العالية وممن تتوافر فيهم الشروط اللازمة للتعيين فى أرفع المناصب القضائية أو يكونون من المتشرعين المشهود لهم بالكفاية[2].

وقد قامت الجمعية الاستشارية بانتخاب قضاة المحكمة الخمسة عشر والمساوين فى عددهم لعدد الدول أعضاء أوروبا حينئذ ، بشرط ألا تشمل أكثر من قاض واحد من جنسية نفس الدولة (بحكم المادة ٣٨ من الاتفاقية) فى ٢١ يناير سنة ١٩٥٩ . وهكذا بدأت المحكمة عقد أولى دوراتها (المادة ٥٦

---

(١) *Annuaire, op. cit.*, I, pp. 190, 255, 256 ; II, pp. 397, 399 ; Pinto, p. 177 ; Vasak, *op. cit.*, p. 132.

(٢) Vasak, *op. cit.*, p. 149 ; Pinto, *op. cit.*, p. 184 ; Ganji, *op. cit.*, p. 246.

من الاتفاقية) ما بين ٢٣ و ٢٨ فبراير سنة ١٩٥٩ لوضع لائحتها الداخلية وقواعد الاجراءات ، واحتفلت رسمياً بقيامها فى ٢٠ أبريل سنة ١٩٥٩ بمناسبة العيد العاشر لتأسيس مجلس أوروبا[١].

وقد سبقت الإشارة إلى أنه لا يشترط أن يكون القضاة (وكذلك أعضاء اللجنة) من جنسية الدول المنضمة للاتفاقية أو أعضاء مجلس أوروبا ، بمعنى أنه يمكن تصور وجود قاض أو أكثر (وكذلك أعضاء اللجنة) من جهات أخرى خارج أوروبا . ومن باب أولى يمكن تصور وجود قاض لفرنسا (وهى دولة غير منضمة للاتفاقية) بالمحكمة ، وهو ما حدث فعلا . وهذا أمر جد مستحسن بالنسبة لنظام رقابة وحماية لحقوق الإنسان التى لا يمكن تصور اختلاف قيمها فى كافة أرجاء المعمورة، على الرغم من اختلاف النظم السياسية والاجتماعية التى تعترف حالياً بالبعض منها دون البعض الآخر . هذا فضلا عن أن هؤلاء القضاة لا يمثلون دولهم وإنما يمثلون ضمير الإنسانية وحقوقها فى كفالة وحماية حقوق الفرد . وحبذا لو انتهج نفس الأسلوب فى اختيار القضاة لدى إنشاء أية محاكم إقليمية أخرى لحقوق الإنسان[٢].

كذلك تجدر الإشارة بادئ ذى بدء إلى أن المادة ٤٠ من الاتفاقية تنص على انتخاب قضاة المحكمة مدة تسع سنوات ، كما يجوز إعادة انتخابهم . على أنه فيما يتعلق بالقضاة المنتخبين فى المرة الأولى ، تنتهى مدة أربعة منهم بالقرعة بعد ثلاث سنوات ، ومدة أربعة آخرين بعد ست سنوات . وقد عهدت الاتفاقية إلى المحكمة بانتخاب رئيسها ونائب رئيسها لمدة ثلاث سنوات ، كما يجوز إعادة انتخابهم (المادة ٤١) . كذلك تختار المحكمة مسجلها ونائب المسجل لمدة سبع سنوات (المواد ١١ — ١٤ من اللائحة) . وعهدت الاتفاقية إلى المحكمة كذلك مهمة وضع لائحتها الداخلية وقواعد الإجراءات الواجب

(١) Modinos, *op. cit.*, p. 1101 ; Vasak, *op. cit.*, p. 149 ; *Annuaire,* II, pp. 131-133.

(٢) Pinto, *op. cit.*, p. 184.

اتباعها أمامها (المادة ٥٥) ، وأقرت المحكمة اللائحة المشار إليها فى ١٨ سبتمبر سنة ١٩٥٩ .

وقد أخذت الاتفاقية الأوروبية فى تشكيل المحكمة بقاعدة القضاة الوطنيين التى أخذ بها النظام الأساسى للمحكمة الدولية بلاهاى (المادة ٣١ من النظام الأساسى) . فقد نصت المادة ٤٣ من الاتفاقية الأوروبية على أنه يجوز انعقاد المحكمة لنظر قضية ما من دائرة تتكون من سبعة قضاة ، من بينهم القضاة التابعين لجنسية الدول ذوات الشأن . وفى حالة غياب أحدهم تختار الدولة المعنية أحد القضاة المنتخبين الآخرين أو أى شخص آخر تتوافر فيه الشروط التى تتطلبها المادة ٣٩ / ٣ ليجلس كقاض خاص *ad hoc* (المادة ٤٣ من الاتفاقية والمادتان ٢٣ و ٢٤ من لائحة المحكمة) . كذلك نصت المادة ١٧ من لائحة المحكمة على أنه يكفى تسعة قضاة منتخبين لصحة تشكيل المحكمة بكامل هيئتها ، وهو نفس فحوى نص المادة ٢٥ / ٣ من النظام الأساسى لمحكمة العدل الدولية .

ومراعاة لكون المحكمة لن تعقد دورات أو جلسات بصفة مستمرة أجيز لأعضائها شغل وظائف أخرى ، على خلاف الحال فى نظام المحكمة الدولية بلاهاى (المادة ١٦ من النظام الأساسى) . وعلى هذا الأساس لم تحدد الاتفاقية الأوروبية مبدأ الرواتب الثابتة بالنسبة لأعضاء المحكمة ، وإنما اكتفت فى المادة ٤٢ منها بالنص على أن يتقاضى أعضاء المحكمة مكافأة عن كل يوم من أيام العمل ، وأن تقوم لجنة الوزراء بتحديد هذه المكافأة .

اختصاص المحكمة الأوروبية لحقوق الإنسان بالرقابة القضائية على تنفيذ الإتفاقية وحماية الحقوق والحريات :

أما فى صدد اختصاص المحكمة بالفصل فى المنازعات ذات العلاقة بتفسير وتطبيق الاتفاقية (المادة ٤٦ / ١) ، فواضح أن هذا الاختصاص اختيارى . إذ لا يمكن مقاضاة دولة عضو فى الاتفاقية أمام المحكمة بصدد المنازعات

المشار إليها ما لم تكن قد صرحت تصريحاً عاماً (بدون قيد أو شرط أو مع بعض التحفظات) بأن اختصاص المحكمة فى هذا الشأن قد أصبح ملزماً لها بحكم القانون وبدون حاجة إلى اتفاق خاص (المادة ٤٦/ ١)[١] ، أو أن توافق هذه الدولة العضو على قبول اختصاص المحكمة المشار إليه فى نزاع معين (المادة ٤٨ من الاتفاقية) ، وتصدر بشأنه تصريحاً خاصاً[٢] .

وقد سبقت الإشارة إلى أن الدول التى قبلت هذا الاختصاص الإلزامى عن رضا واختيار باصدارها تصريحاً عاماً فى هذا الصدد قد أصبحت ثمان دول من بين الدول الستة عشر المنضمة للاتفاقية الأوروبية . وهذه الدول الثمانية هى هولندا وبلجيكا ولوكسمبرج وأيرلندا والدانمرك وألمانيا الاتحادية والنمسا وايسلندا . ولكن ما من دولة منها إلا أوردت تحفظاً أو أكثر على تصريحها العام بقبول الاختصاص الإلزامى للمحكمة . وتنقسم هذه التحفظات ما بين تحفظات تقيد قبول الاختصاص الإلزامى بشرط المعاملة بالمثل (مع الدول الأخرى أعضاء الاتفاقية والتى تقبل نفس الالتزام) ، أو تحفظات تحدد أجلا لنفاذ التصريح بقبول الاختصاص (المادة ٤٦/٢ من الاتفاقية) . فمن قبيل التحفظات الأولى الخاصة بشرط المعاملة بالمثل ما جاء بتصريحات هولندا ولوكسمبرج والنمسا وألمانيا الاتحادية . ومن المعلوم أنه فيما عدا أيرلندا ، قد أوردت الدول الأخرى التى قبلت الاختصاص الإلزامى للمحكمة تحفظات على تصريحها العام قيدت فيه قبولها للاختصاص بمدد لا تزيد عن خمس سنوات. وعلى الرغم من أن أيرلندا لم تقيد قبولها للاختصاص بمدة محددة ، إلا أنها تحفظت فى الوقت نفسه بحقها فى العدول عن هذا القبول عامة باخطار سابق[٣] .

ولما كانت هذه الدول الثمانية التى قبلت الاختصاص الإلزامى للمحكمة

---

(١) يردد هذا النص عبارات نص المادة ٣٦ / ٢ و ٣ من النظام الأساسى لمحكمة العدل الدولية

(٢) Ganji, *op. cit.*, p. 248 ; Pinto, *op. cit.*, p. 186 ; Vasak, *op. cit.*, p. 161.

(٣) انظر فى شأن هذه التصريحات والتحفظات
Annuaire, op. cit., II, pp. 158-159.

هى بين الدول العشر التى قبلت الشرط الاختيارى بقبول نظر اللجنة الأوربية لشكاوى الأفراد ضدها ، فقد أصبح للجنة الأوروبية حق الالتجاء إلى المحكمة نيابة عن الأفراد فى صدد المنازعات التى تتعلق بتفسير وتطبيق الاتفاقية ضد أى من هذه الدول الثمانية ، وذلك فى خلال الأشهر الثلاثة التى تنقضى من تاريخ إحالة تقرير اللجنة إلى لجنة الوزراء (المواد ٣٢ ، ٤٧ ، ٤٨ من الاتفاقية) .

كذلك يحق لأية دولة عضو بالاتفاقية ينتمى إليها الشخص الذى اعتدى على حقوقه أو حرياته ، أو تلك التى تكون قد تقدمت بالطلب إلى اللجنة ، أو غيرهما ممن تكون الشكوى قد قدمت أمام اللجنة ضدها ، يحق لأى من هذه الدول الثلاثة أن تلجأ أيضاً إلى المحكمة فى شأن نزاع من القبيل المشار إليه ، خلال المدة المحددة[1] .

وليس من الضرورى أن يصبح اللجوء إلى المحكمة ضد إحدى الدول الثمانية التى أصدرت تصريحاً عاماً بقبول الاختصاص الإلزامى للمحكمة فحسب ، وإنما يجوز أن يصبح ضد أية دولة أخرى عضو بالاتفاقية ولم تصدر تصريحاً عاماً ، ولكنها تصدر تصريحاً خاصاً بقبول ولاية المحكمة فى شأن نزاع بعينه ، حتى ولو كان ذلك بعد رفع الدعوى أمام المحكمة من قبل اللجنة أو دولة معنية بالأمر من قبيل الدول الثلاث المشار إليها . فاذا لم تصدر الدولة المشكو فى حقها مثل هذا التصريح الخاص بقبول اختصاص المحكمة أو أعلنت رفضها لهذا الاختصاص ، تعين على المحكمة شطب الدعوى[2] .

---

(١) انظر فى هذا الشأن

Vasak, *op. cit.*, pp. 163-164.

ويشير فى هذا الصدد إلى أهمية منح اللجنة حق التقاضى ورفع الدعوى أمام المحكمة حالة ما إذا كانت الدول التى تعترف باختصاصها الإلزامى تورد على تصريحاتها تحفظات بالمعاملة بالمثل ، قد تؤدى حينئذ إلى إهدار حقوق الأفراد وعدم إمكان حمايتها بالوسيلة الصحيحة عن طريق إحدى الدول المعنية المشار إليها ، لأن تحفظات المعاملة بالمثل لا تسرى بالنسبة للجنة .

(٢) Vasak, *op. cit.*, pp. 161-162; Pinto, *op. cit.*, p. 186.

وقد استقر فقه المحكمة الدولية بلاهاى على الأخذ بهذا المبدأ *forum prorogatum* (حكم قضية مدارس الأقليات فى سيليزيا العليا فى ٢٨ أبريل سنة ١٩٢٨)[١] . كما يؤكد الأخذ به فى التقاضى أمام المحكمة الأوروبية نص المادة ٤٨ من الاتفاقية التى تؤكد أنه « إذا لم تكن الدولة أو الدول المتعاقدة خاضعة للاختصاص الإلزامى للمحكمة ، يشترط موافقة أو رضاء الدولة السامية المتعاقدة . . » ، فضلا عما تفيده الأعمال التحضيرية للاتفاقية فى هذا السبيل[٢] . فالأخذ به إنما يعنى أن المحكمة الأوروبية لحقوق الإنسان هى جهاز دولى أوروبى مفتوح أمام جميع الأطراف المتعاقدة فى الاتفاقية الأوروبية للفصل فى خصوماتهم بشأن تفسير وتطبيق هذه الاتفاقية وحماية الحقوق والحريات المعترف بها فيها ، وليس جهازاً محدوداً بعضوية الدول المتعاقدة التى تقبل اختصاصها الإلزامى بصفة عامة .

على أنه يبين مما تقدم أن اختصاص المحكمة الأوروبية لحقوق الإنسان بنظر المنازعات المشار إليها ليس اختصاصاً مفتوحاً لجميع الدول أعضاء الاتفاقية بما قد يتبادر للذهن . فهو ليس اختصاصاً ذى صفة عامة caractère général ، وإنما هو اختصـــاص ثانوى ، يأتى فى المحل الثانى لاختصاص اللجنة الأوروبية لحقوق الإنسان بنظر هذه المنازعات . وهذا واضح من نص المادة ٤٧ من الاتفاقية حيث تقول : « لا يجوز عرض أى دعوى على المحكمة إلا بعد أن تكون اللجنة قد تبينت عدم إمكان الوصول إلى تسوية ودية ، وبشرط أن يتم عرض الدعوى فى خلال الأشهر الثلاثة المبينة فى المادة ٣٢ » .

ومن ثم فان المحكمة لا يمكن لها أن تنظر نزاعاً تتقدم به إليها إحدى الدول الأعضاء فى الاتفاقية والسابق الإشارة إليها ، ما لم تكن اللجنة قد قبلت هذا النزاع ونظرته . أما إذا كانت اللجنة قد رفضت قبوله ابتداء بسبب عدم

(١) *Serie A*, no. 15, p. 23.

(٢) Vasak, *op. cit.*, pp. 162-163.

جديته أو عدم تأسيسه على مبررات معقولة بالمفهوم الواسع ، فأنه يصبح ولا محل لنظره أو عرضه على المحكمة[1].

وقد استرعى هذا الأمر نظر اللجنة القانونية للجمعية الاستشارية لمجلس أوروبا ، فأوصت بعقد لجنة من الخبراء لتوسيع نطاق اختصاص المحكمة عما عليه الحال طبقاً للمادة ٤٥ من الاتفاقية ، وذلك عن طريق منحها اختصاصاً مماثلا لاختصاص محكمة العدل الدولية فى أن تفتى فى المسائل القانونية الخاصة « بتفسير نصوص الاتفاقية الأوروبية لحقوق الإنسان حالة وجود شك حول هذه المسائل القانونية ، ولو لم يكن هناك نزاع بشأنها »[2]. وتعنى العبارة الأخيرة إمكان اللجوء للمحكمة الأوروبية لطلب الفتوى حتى ولو لم يكن الأمر قد سبق عرضه على اللجنة[3].

وعلى هذا الأساس انتهى فى البروتوكول الثانى الموقع فى ٦ مايو سنة ١٩٦٣ إلى أن يصبح للجنة الوزراء بمجلس أوروبا حق طلب الفتوى من المحكمة الأوروبية لحقوق الإنسان فى المسائل القانونية ذات العلاقة بتفسير الاتفاقية والبروتوكولات الملحقة بها (المادة ١ / ١ من البروتوكول).وحددت الفقرة الثانية من المادة الأولى لهذا البروتوكول اختصاص المحكمة بابداء الرأى الاستشارى فى صدد المسائل القانونية المشار إليها كالآتى :

« يجب ألا تعرض هذه الآراء الاستشارية لأية مسألة تتعلق بمضمون أو نطاق الحقوق والحريات المحددة فى الباب الأول من الاتفاقية وفى البروتوكولات الملحقة بها ، أو تتعلق بأية مسائل أخرى يكون للجنة والمحكمة أو لجنة الوزراء أن تنظرها طبقاً للاجراءات المرسومة بالاتفاقية » [4].

---

(١) Pinto, *op. cit.*, p. 185 ; Vasak, *op. cit.*, p. 158 ; Giuseppe Sperduti, L'Individu et le Droit International, *Recueil des Cours,* 1956, II, p. 819.

(٢) Annuaire, *op. cit.,* II, pp. 170-171 ; Vasak, *op. cit.*, p. 165.

(٣) Pinto, *op. cit.*, p. 186.

(٤) *American Journal Of International Law,* Jan., 1964, p. 331.

وأخيراً تجدر الإشارة إلى أن الاتفاقية الأوروبية لحقوق الإنسان لا تضع أية قيود على حق اللجنة أو الدول المعنية المشار إليها فى اللجوء إلى المحكمة الأوروبية ، سوى مدة الشهور الثلاثة التى تبدأ (طبقاً للمادة ٣٢ من الاتفاقية) من تاريخ إحالة تقرير اللجنة الأوروبية لحقوق الإنسان (بعد أن تبينت تعذر الوصول إلى تسوية ودية عن طريقها) إلى لجنة الوزراء ، وهى المدة التى تقضى المادة ٤٧ من الاتفاقية على أن يتم عرض الدعوى (من قبل اللجنة الأوروبية أو إحدى الدول المعنية المشار إليها) خلالها ، وإلا أصبح للجنة الوزراء فور انتهاء هذه المدة أن تمارس حقها فى اتخاذ قرار بأغلبية ثلثى الممثلين الذين لهم حق حضور جلساتها بما إذا كانت قد وقعت مخالفة للاتفاقية الأوروبية أو لم تقع (المادة ٣٢ من الاتفاقية) .

وبمعنى أصح لا توجد أية شروط تتعلق بما انتهت إليه اللجنة الأوروبية لحقوق الإنسان فى تقريرها . فالدولة المشكو فى حقها ، والتى صدر تقرير اللجنة فى صالحها ، قد ترى مع ذلك أن تلجأ إلى المحكمة الأوروبية لحقوق الإنسان من أجل الحصول على حكم قضائى بات وملزم بما يؤيد وجهة نظرها فى النزاع . كذلك قد ترى الدولة التى يتبعها الفرد الشاكى أن تلجأ إلى المحكمة ضد الدولة الأخرى التى تقبل اختصاص المحكمة للحصول على حكم قضائى يكفل رعاية حقوق رعيتها ، أو للحصول على التعويض الضرورى عما لحق به من أضرار نتيجة خرق حقوقه وحرياته ، وذلك على الرغم من وجود قرار للجنة فى صالح هذا الفرد[1] .

بل ليس هناك ما يحول بين اللجنة الأوروبية لحقوق الإنسان وبين أن تلجأ هى نفسها إلى المحكمة فى صدد نزاع أصدرت بشأنه تقريراً يؤيد وجهة نظر الدولة المشكو فى حقها بأنها لم تأت فعلا يعد خرقاً لأحكام الاتفاقية الأوروبية ، وأحالت هذا التقرير إلى لجنة الوزراء . فتقرير اللجنة فى هذا الصدد ، وإن قام على أساس ما تبينته اللجنة فى سعيها المحايد للتوفيق بين أطراف

(١) Pinto, *op. cit.*, pp. 188-189.

النزاع من وقائع وما تلمسته فى فحصها الموضوعى لحجج الطرفين من نقاط قانونية ، إلا أنه لا يعدو أن يكون رأياً استشارياً فى النزاع يصلح للعرض أمام المحكمة فى نظرها للمسائل القانونية ذات العلاقة بتفسير وتطبيق الاتفاقية الأوروبية وإصدار حكم نهائى وملزم من الجهة القضائية المختصة فى صددها .
ولا بأس من أن تقوم اللجنـــة ذاتها بعرض مثل هذا النزاع ، لأن ذلك لا ينفى التزامها جانب الحيدة والاستقلال والموضوعية فى فحصها السابق لجوانب النزاع ؛ ولن يعنى بأى حال من الأحوال أنها حين انتقلت من دور الوسيط الذى يقوم بالتسوية الودية إلى دور من يتقدم برفع الدعوى أمام المحكمة متلمساً الصواب فى الناحية القانونية مثار الخلاف فى الرأى بينها وبين الدولة المشكو فى حقها — أنها قد غيرت من وجهة نظرها فى عدم أحقية الشاكى أو أسقطت حيادها وعدلت عن نظرتها الموضوعية إلى وقائع النزاع . ولكن قد يكون هناك من المسائل القانونية المتنازع بشأنها ما تهدف اللجنة إلى طرحه أمام المحكمة للانتهاء بصدده إلى فصل فى الموضوع بصفة باتة وملزمة[1] . ومن الواضح أن اللجنة فى هذا السبيل تمارس حقها من أجل المصلحة العامة من جانب ، كما تؤكد حيدتها ووجوب ثقة الأطراف المتنازعة أمامها ابتداء فى سلامة الاجراءات والوسائل التى انتهجتها لحل النزاع ودياً من قبل . وقد أبان السير همفرى والدوك رئيس اللجنة وممثلها أمام المحكمة فى قضية لاولس وجهة النظر هذه فى مرافعته الشفوية وعرضه لأسباب الدعوى فى القضية المذكورة ، حيث أكد أن قيام اللجنة برفع الدعوى فى هذه القضية لا يعنى أنها قد غيرت وجهة نظرها فى التقرير المرفوع منها إلى لجنة الوزراء (بأغلبية ثمانية أعضاء ضد ستة أعضاء) ، أو أنها قد أصبحت تتشكك فى الأسس التى بنت عليها تقريرها ، ولكنها قد ترى فى صدور حكم قضائى من الجهة المختصة ما يؤيد ويعزز فقه اللجنة فى المسألة القانونية التى تختلف فيها اللجنة مع الحكومة الأيرلندية ، وهى مسألة تتعلق بحق الدول فى التحلل من أحكام الاتفاقية

---

(١) *Ibid*, p. 188.

فى وقت الحرب أو الأزمات والتفسير الصحيح للحدود التى يجب أن تلتزمها الدول فى هذا الصدد تطبيقاً للمادة ١٥ من الاتفاقية الأوروبية . فحقيقة الأمر أن تفسير المادة ١٥ من الاتفاقية الأوروبية لحقوق الإنسان قد عرضت له اللجنة فى تسع حالات سابقة على شكوى لاولس ، وقد تضاربت الآراء وثار الجدل حولها كثيراً ، مما استدعى اللجنة بلسان رئيسها أن تعرض الأمر للفصل فيه من قبل المحكمة[1] .

نشاط المحكمة الأوروبية لحقوق الإنسان (سير الاجراءات وصدور الأحكام) :

فى ١٣ أبريل سنة ١٩٦٠ أحالت اللجنة الأوروبية لحقوق الإنسان إلى المحكمة الأوروبية لحقوق الإنسان، أثناء انعقاد هذه الأخيرة فى دورتها الرابعة (بمقر مجلس أوروبا فى ستراسبورج) برئاسة لورد ماكنير، القضية الأولى، تطبيقاً للمادة ٤٨ من الاتفاقية الأوروبية ، وهى قضية Gerard Richard Lawless الأيرلنــدى الجنسية ضد الحكومة الأيرلندية ، وهى القضية السابق الإشارة إلى موضوع الشكوى فيها فيما تقدم .

وتطبيقاً لحكم المادة ٤٣ من الاتفاقية ولائحة المحكمة، شكل رئيس المحكمة أثناء وجوده بلندن فى ١٨ مايو سنة ١٩٦٠ وبحضور مسجل المحكمة المساعد، دائرة من سبعة قضاة لنظر هذه القضية . فاختار إلى جانب القاضى الأيرلندى الجنسية من أعضاء المحكمة ستة قضاة آخرين بالقرعة ، كما اختار ثلاثة قضاة مناوبين .

وفى أول يونيه سنة ١٩٦٠ عقدت الدائرة المذكورة جلستها الأولى بمقر مجلس أوروبا فى ستراسبورج، وأخذت برئاسة R. Cassin القاضى الفرنسى الجنسية ، تقرر الاجراءات اللازمة لنظر الدعوى وتحديد المواعيد وتلقى

---

(١) European Court of Human Rights, *Verbatim Report, Lawless Case,* 1960, A 58.287, pp. 3-5.

الوثائق والمذكرات ودعوة وكلاء الحكومة الأيرلندية وممثلى اللجنة إلى بسط وجهات نظرهم حول المسائل الاجرائية الواجب اتباعها (المادة ٣٥ من لائحة المحكمة)[1].

وبانتهاء هذه المرحلة دخلت قضية لاولس طوراً جديداً حيث بدأ نظرها علناً وباجراءات التقاضى الاعتيادية . وعقدت جلسات للمرافعة الشفوية العلنية فيما بين ٧ و ١١ أبريل سنة ١٩٦١ ، حتى صدر الحكم فيها فى أول يوليو سنة ١٩٦١ . ذلك أن الاتفاقية الأوروبية لم تضع شرطا خاصاً بسرية الاجراءات والمرافعات أو صدور الحكم فى الدعاوى المنظورة أمام المحكمة ، أسوة بما نصت عليه فى هذا الصدد أمام اللجنة الأوروبية ولجنة الوزراء (المواد ٣٠ و ٣٢/٢ من الاتفاقية) ما لم تقرر هذه الأخيرة نشر التقرير .

وهكذا تقرر المادتين ١٨ و ٥٥ من لائحة المحكمة علانية الاجراءات التى يتخذها كل خصم فى مواجهة الآخر . كما تشترط المادة ٦ من الاتفاقية فى شأن نظر الدعاوى أمام المحاكم الوطنية بطريقة عادلة أن تتم الاجراءات بطريقة علنية ، كما يصدر الحكم علنياً . وعلى هذا الأساس قررت المحكمة الأوروبية لحقوق الإنسان فى حكمها بتاريخ ١٤ نوفمبر سنة ١٩٦٠ (فى قضية لاولس) بالنظر فى الدفوع حول المسائل الاجرائية قبل الفصل فى الموضوع[2] ، أنه منذ أن يبدأ نظر نزاع ما أمامها فان قواعد الاجراءات التى يتطلبها نظام ديمقراطى (كذلك الذى تستهدفه ديباجة الاتفاقية الأوروبية وبنودها) تستدعى علانية الاجراءات التى يتخـــذها كل خصم حضورياً فى مواجهة الآخر doit avoir un caractère contradictoire et public ، وأن يكون النطق بالحكم علنـــاً .

---

(١) European Court of Human Rights, IP/1506 ; IP/1411.

(٢) للمحكمة أن تصدر أحكاماً فى المسائل التمهيدية قبل الفصل فى الموضوع ، كالدفوع الشكلية بعدم الاختصاص وعدم جواز قبول الدعوى أصلا وحول بعض المسائل الاجرائية (المادة ٤٦ من لائحة المحكمة) Pinto, *op. cit.*, 194.

ولكن مما لا شك فيه أن المحكمة تملك أن تقرر سرية الجلسات فى بعض الأحوال الاستثنائية ، أسوة بما يكون عليه الحال أمام المحاكم الوطنية إذا كان موضوع الدعوى يمس النظام العام أو الآداب . كذلك لا يجوز نشر أية أوراق تتعلق بالدعوى أثناء سير الاجراءات فى الجلسات وقبل الحكم فيها (كمحاضر الجلسات) دون تصريح خاص من المحكمة[1] . على أن ذلك يجب ألا يؤثر على علانية المرافعات حسب الطابع والنظام القضائى المعتاد بحال من الأحوال .

وباختتام الاجراءات ، تصدر المحكمة حكمها فى موضوع الدعوى . وهو حكم ملزم بنص المادة ٥٣ من الاتفاقية التى تقرر « تعهد الأطراف السامية المتعاقدة بمراعاة أحكام المحكمة فى المنازعات التى تكون أطرافاً فيها » . ومن ثم يحال الحكم إلى لجنة الوزراء التى تتولى الإشراف على تنفيذه (المادة ٥٤ من الاتفاقية) .

وتنص المادة ٥١ / ١ من الاتفاقية على أن « تكون أحكام المحكمة مسببة » « فاذا كان حكم المحكمة لا يعبر فى جملته أو فى جزء منه عن اجماع رأى القضاة ، فلكل قاض الحق فى أن يلحق بالحكم رأياً انفرادياً » ، سواء فى ذلك كان الرأى الانفرادى يعبر عن وجهة نظر الأغلبية أم يعارضها (المادة ٥١ / ٢ من الاتفاقية و ٥٠ / ٢ من لائحة الاجراءات)[2].

---

(١) قد يؤثر هذا على حق الفرد الذى تتقاضى اللجنة نيابة عنه أمام المحكمة فى الاطلاع على المذكرات والمكاتبات ومحاضر الجلسات الخاصة بالدعوى المتعلقة بشكواه ، دون الفرد الذى تتولى دولة ما الدفاع عنه والذى قد يملك فى هذه الحالة الاطلاع على هذه الأوراق وعلى تقرير اللجنة عن طريق أجهزة الدولة المعنية بأمره . على أن لكل من اللجنة أو الدولة المعنية بالأمر الحق فى الاتصال بالشاكى ومناقشته فى وقائع الدعوى أثناء سير الاجراءات أو إطلاعه على أوراق الدعوى بشرط مراعاة طابع السرية فى عدم نشر هذه الأوراق علانية دون تصريح من المحكمة
Pinto, *op. cit.*, p. 192.

(٢) من الملاحظ أنه لا يوجد بالاتفاقية ولا بلائحة المحكمة نص يحدد الأغلبية التى يصدر بها الحكم فى الدائرة المخصصة لنظر الدعوى . Pinto, *op. cit.*, p. 185.

وتنص المادة ٥٢ من الاتفاقية على أن « أحكام المحكمة نهائية »[1]. ويعنى النص عدم جواز طرح النزاع أمام المحكمة من جديد ، لأن هذه الأحكام تعتبر بطبيعتها حضورية ، فلا تقبل المعارضة ، كما لا يجوز استئنافها . هذا وإن كانت لائحة المحكمة قد نظمت من ناحية أخرى قواعد الرجوع إلى المحكمة فى شأن تفسير الحكم أو التماس إعادة النظر فيه (المادتين ٥٣ و ٥٤ من لائحة المحكمة)[2].

وقد نظمت الاتفاقية الأوروبية ولائحة المحكمة عدة وسائل لانهاء سير الخصومة فى الدعوى أمام المحكمة . ويمكن تحديد هذه الوسائل فى الآتى :

١ — التسوية الودية ، إذا استطاعت اللجنة الأوروبية لحقوق الإنسان أن تتوصل إلى تحقيقها بين الأطراف المتنازعة بعد إحالة النزاع إلى المحكمة . فاذا تحقق للجنة الغرض الذى استهدفته ولكنها فشلت فيه قبل إحالة النزاع ، فانها تستطيع من بعد أن تخطر الدائرة التى تقوم بنظر القضية أنها استطاعت التوصل إلى تسوية ودية للموضوع « يراعى فيهـــا احترام حقوق الإنسان كما تقرها الاتفاقية » (وفقاً للمادة ٢٨ منها) ، وأن تطلب بناء على ذلك من المحكمة شطب الدعوى من جدول أعمالها . وللدائرة المذكورة بعد ذلك ، وبعد الاستئناس برأى ممثلى اللجنة إن شاءت ، أن تقرر شطب الدعوى أو عدمه (المادة ٤٧ / ٣ من لائحة المحكمة) .

٢ — يمكن كذلك انهاء سير الخصومة باثبات المحكمة تنازل الطرف الذى

---

(١) من الملاحظ أن الاتفاقية لم تفرق بين الحكم arrêt والقرار décision ، واستخدمت كل من اللفظين محل الآخر للتعبير عن وسائل فض الخصومة والفصل فيها أمام المحكمة . وإن كانت اللائحة تستخدم لفظ القرار بصفة عامة ، بينما تستخدم لفظ الحكم فى القرارات المتعلقة بالفصل فى اختصاص المحكمة وعدم جواز قبول الدعوى أصلا وبالفصل فى موضوع الدعوى . وبمعنى أصح يمكن إذاً استخدام لفظ الحكم فى جميع الحالات التى يتعلق فيها الأمر بانهاء نظر الدعوى أمام المحكمة بقرار منها . ومن ثم كان قرار شطب دعوى دى بيكر من جدول أعمال المحكمة حكماً ، بينما يكون تصديق المحكمة على التنازل عن السير فى الخصومة باتفاق الأطراف المعنية قراراً. Vasak, *op. cit.*, p. 181.

(٢) انظر على سبيل المثال فى هذا الشأن المواد ٥٩ ، ٦٠ ، ٦١ من النظام الأساسى لمحكمة العدل الدولية .

قام برفع الدعوى عن السير فى اجراءاتها واتفاق الأطراف الأخرى المتنازعة معه على عدم الرغبة فى الاستمرار فى الاجراءات . فللمحكمة حينئذ ، وبعد أخذ رأى اللجنة فى هذا الصدد ، أن تقرر التصديق على هذا التنازل وشطب الدعوى من جدول أعمالها ، أو أن تقرر استمرار السير فى الاجراءات (المادة ٤٧ / ١ ، ٢ من لائحة المحكمة) . فاذا اتخذت المحكمة قرارها بالتصديق على التنازل ، قامت بابلاغ قرارها المسبب فى هذا الصدد إلى لجنة الوزراء التى تقوم وفقاً للمادة ٥٤ من الاتفاقية بالإشراف على تنفيذه (المادة ٤٧ / ١ من لائحة المحكمة) . وهكذا تستطيع المحكمة فى أى من الحالتين ، أن تقدر الموقف فيما يتعلق بقيامها بالاعباء الملقاة على عاتقها بموجب المادة ١٩ من الاتفاقية فى العمل على ضمان احترام الدول الأعضاء لتعهداتها فى الاتفاقية .

٣ ـ وقد انتهجت المحكمة لدى انهائها سير الخصومة فى القضية الثانية التى عرضت عليها (وهى قضية Raymond De Becker البلجيكى الجنسية ضد حكومة بلجيكا) اسلوباً ثالثاً لم ينص عليه فى لائحتها . ومع ذلك يمكن القول بأنها قد طبقت فى ذلك مبدأ الرقابة على تنفيذ الاتفاقية بحكم اختصاصها فى هذا الشأن طبقاً للمادة ١٩ من الاتفاقية . فعلى الرغم من أن كلا من اللجنة (التى قامت باحالة نظر الدعوى إلى المحكمة) والحكومة البلجيكية قد طلبتا إلى المحكمة شطب الدعوى من جدول أعمالها ، فان هذا الطلب لم يسبقه التوصل إلى تسوية ودية للنزاع بوصف أن الدعوى وإن كانت قائمة بين الطرفين اللذين طلبا الشطب إلا أن المصلحة فى الوصول إلى تسوية ودية للنزاع تتعلق بالفرد الشاكى . وقد كانت التسوية الودية ، من جانب ، هى الأساس الذى أجازت المادة ٤٧ / ٣ من لائحة المحكمة فى ضوئه إمكان شطب الدعوى من جدول أعمال المحكمة ، كما سبق إيضاحه فى الوسيلة الأولى . كذلك فان اللجنة[1] ، من جانب آخر ، لم تتنازل مسبقاً عن السير فى الخصومة ، كما هو أساس الشطب

---

(١) اللجنة هنا هى طرف الخصومة الذى يلزم تنازله ابتداء . ولا أهمية هنا لتنازل دى بيكر نفسه لأنه ليس طرفاً فى إجراءات التقاضى أمام المحكمة ، كما سبق إيضاحه آنفاً .

فى الوسيلة الثانية قبل التوصل إلى اتفاق الأطراف المتنازعة على عدم الرغبة فى الاستمرار فى الاجراءات ، كما أوضحنا فى الوسيلة الثانية .

وعلى هذا الأساس أصدر القاضى A. Ross رأيه الانفرادى معترضاً على حكم المحكمة بشطب الدعوى من جدول أعمالها . وأضاف القاضى المذكور إلى الآراء السابقة وجهة نظره بأن قرار المحكمة المذكور، وقد أتى فى أعقاب تراجع الحكومة البلجيكية وخوفها من صدور حكم فى الموضوع ضدها واتخاذها الاجراءات بتعديل قانون العقوبات البلجيكى ، قد يكون له صداه وأثره السيئ لدى الرأى العام، خاصة لو كانت الحكومة البلجيكية قد عمدت إلى اتخاذ هذه الاجراءات بعد رفع الدعوى ضدها كعمل من قبيل المناورة لإيقاف السير فى الخصومة واتخاذ حكم بات وملزم فى غير صالحها[1] .

غير أن المحكمة بأغلبية آراء الستة الآخرين من أعضـــاء الدائرة قد أصدرت حكمها فى ٢٧ مارس سنة ١٩٦٢ بشطب القضية من جدول أعمالها ، بعد أن أدى بحثها فى هذا الصدد إلى تبين نشوء وقائع جديدة طرأت على موضوع القضية بعد إحالتها إلى المحكمة مما قد يؤدى إلى حل النزاع . فمن ناحية صدر القانون البلجيكى المؤرخ ٣٠ يونيه سنة ١٩٦١ والمعدل لأحكام قانون العقوبات التى كانت موضع شكوى دى بيكر . ومن ناحية ثانية أيدت اللجنة بطلبها شطب الدعوى تصريح دى بيكر الذى أبلغه للجنة فى ٥ أكتوبر سنة ١٩٦١ بأن صدور القانون الجديد المذكور قد حقق له الترضية اللازمة بحيث أصبح ولا مصلحة له فى الاستمرار فى المطالبة بادعاءاته السابقة أمام اللجنة . ومن ناحية ثالثة رأت المحكمة أن دى بيكر لم يتقدم فى شكواه الأصلية أمام اللجنة بطلب التعويض عما لحقه من أضرار فى المدة

---

(١) Pinto, *op. cit.*, p. 193.
وانظر فى شأن هذه القضية
R. Pelloux, L'Arrêt de la Cour Européenne, *Annuaire Français*, 1962, p. 335.

السابقة على تعديل قانون العقوبات البلجيكى، بحيث يكون للمحكمة أن تستمر فى نظر الدعوى لتقضى له به[1] .

٤ ــ وأخيراً هناك الفصل من جانب المحكمة فى موضوع الدعوى بحكم بات وملزم فى النزاع من جانبها . وقد سبقت الإشارة إلى أن هذا الحكم يصدر علنياً وبعد السير فى مجموعة من الاجراءات العلنية والحضورية من قبل كل خصم فى مواجهة الآخر . غير أنه إذا تخلف أحد الطرفين عن الحضور أمام المحكمة أو عجز عن الدفاع عن مدعاه ، جاز الطرف الآخر أن يطلب إلى المحكمة أن تحكم له هو بطلباته[2] .

ويجب أن يحدد الحكم هنا ما إذا كانت أحكام الاتفاقية قد روعيت واحترمت فى الحالة التى هى موضوع الشكوى والخصومة التى تنظرها المحكمة ؟ ! فاذا ثبت خلاف ذلك كان على المحكمة أن تصدر حكمها معلنة أن السلطة القضائية أو غيرها من السلطات الأخرى فى الدولة المتعاقدة المشكو فى حقها قد اتخذت اجراءاً أو تدبيراً يتعارض مع الالتزامات المبينة فى الاتفاقية الأوروبية تعارضاً كلياً أو جزئياً (المادة ٥٠ من الاتفاقية) . وفى الوقت نفسه يجب أن يقرر الحكم ما إذا كان القانون الداخلى للدولة المذكورة يسمح بازالة نتائج ذلك الاجراء أو التدبير بصورة كاملة ؟ ! فاذا لم يكن الأمر كذلك كان للمحكمة أن تقرر فى حكمها منح ترضية عادلة للطرف الذى لحق به الأذى إذا رأت محلا لذلك (المادة ٥٠ من الاتفاقية) . ومن الواضح أن نص المادة ٥٠ بالصورة المشار إليها هو نص عتيق ، يعود فى ذاته بالمفهوم الثورى للاتفاقية الأوروبية لحقوق الإنسان القهقرى ، لأنه يحمى التعارض بين القانون الداخلى للدولة وبين الالتزامات المعترف بها فى الاتفاقية عن طريق أحكام المحكمة التى لا يباح لها فى مثل هذه الحالة أكثر من تقرير مبدأ المسئولية الدولية والتعويض عنها ، بدلا من فتح الباب أمام هذا التعارض على

---

(١) European Court Of Human Rights, IP/1590.

(٢) Pinto, *op. cit.*, p. 194.
وانظر فى هذا الشأن نص المادة ٥٣ / ١ من النظام الأساسى لمحكمة العدل الدولية .

مصراعيه بما يؤدى إلى إزالة النتائج السيئة للاجراء أو التدبير الذى يتعارض وأحكام الاتفاقية[1].

ولقد أدى هذا الاحساس لدى البعض إلى محاولة تفسير النص المذكور تفسيراً واسعاً فى ضوء ما نصت عليه المادة ٤٧ من لائحة المحكمة باحالة قرار المحكمة بالتصديق على التنازل عن السير فى الخصومة إلى لجنة الوزراء لتتولى الإشراف وفقاً للمادة ٥٤ من الاتفاقية « على تنفيذ أيةخطوات قدتتعلق بعدم السير فى الاجراءات صدرت عن دائرة المحكمة أو بالاتفاق معها »[2]. ويعنى ذلك بطبيعة الحال أن الحكم فى موضوع الدعوى قد يكون على خلاف ما قد يوحى به نص المادة ٥٤ من الاتفاقية ، إذ قد يتضمن أمراً بالغاء التدابير المنافية لأحكام الاتفاقية ، أو إعادة الشيء أو الحال إلى ما كان عليه ، إلى جانب تقرير الترضية اللازمة كالتعويض المالى حالة الاخفاق فى تنفيذ التدابير والاجراءات العينية الأخرى السابقة .

ومع ذلك فيبدوأن للمحكمة بموجب نص المادة ٥٤ من الاتفاقيةالمشار إليه ، جانب ثورى يجب ألا نغفل عنه النظر . وذلك فيما يتعلق بكون الترضية العادلة أو التعويض المادى عن الضرر يصبح بمفهوم النص من حق الطرف الذى لحق به الضرر أو الأذى ، وبمعنى أصح من حق الفرد الشاكى أو المضار . فاذا كانت قواعد القانون الدولى التقليدي تجيز للدولة التى تتولى حماية مصالح الفرد وتبنى شكواه أمام أية محكمة دولية أن تصبح هى وحدها صاحبة الحق فى التعويض ، وأن يكون لها وحدها حق التصرف فى رده إلى الفرد المضار كله أو بعضه أو الاحتفاظ به لديها ، فان هذا المبدأ قد لحق به تطور كبير وبالغ الأهمية فى الاعتراف بشخصية الفرد وبروز مركزه ودوره فى إجراءات التقاضى الدولية أمام المحكمة الأوروبية لحقوق الإنسان ، حتى أصبح من حقه وحده أن تلحق به نتائج هذه الاجراءات سواء فيما يتعلق

(١) Vasak, *op. cit.*, p. 186.

(٢) Pinto, *op. cit.*, p. 194.

بتصحيح الوضع أو بالتعويض عن الضرر . والقول بخلاف ذلك يتنافى ودور اللجنة الأوروبية لحقوق الإنسان فى القيام برفع الدعوى أمام المحكمة نيابة عن الفرد ، لأن صدور الحكم بالتعويض للطرف المضار — كنص المادة ٥٤ — فى هذه الحالة إنما يقصد به تعويض الفرد عما لحقه من الأذى ولا محالة . ومن ثم فلا يجوز أن نفرق بين الطرف الذى يحصل على التعويض حال قيام اللجنة برفع الدعوى وبين الطرف الذى يحصل عليه حال قيام إحدى الدول الأطراف المتعاقدة برفعها . وهذا هو ما اتجه إليه حكم المحكمة فى ١٤ نوفمبر سنة ١٩٦٠[1] .

أهمية المحكمة من حيث مركز الفرد :

من مجموع الشواهد السابق الإشارة إليها نستطيع أن نتبين إلى أى مدى تطور وارتقى مركز الفرد فى نطاق الاتفاقية الأوروبية لحقوق الإنسان ، ولا سيما بمنحه حق الشكوى أمام اللجنة الأوروبية كجهاز دولى محايد . غير أن التطـــور الصحيح الذي يمكن الاعتداد به فى هذا المضمار هو مدى التغيير الذي طرأ على مركز الفرد أمام المحكمة الأوروبية كجهاز قضائى دولى يمكن للفرد أن ينتصف أمامه لنفسه فى مواجهة الدولة التى خرقت حقوقه أو أهدرت حرياته من بين الدول التى تقبل اختصاص اللجنة بقبول شكاوى الأفراد ، واختصاص المحكمة الالزامى ، ولو كانت دولته نفسها .

ومن المعروف وفقاً للشروح السابقة ، أنه وإن كان يحق للفرد أو مجموعات الأفراد أو المنظمات غير الحكومية أن تصبح أطرافاً فى المنازعات أمام اللجنة، فليس لها حق التقاضى أمام المحكمة الأوروبية . وبالأصح ليس للفرد أن يقبل مدعياً أو مدافعاً عن نفسه، بأن يكون طرفاً مباشراً فى المنازعات المتعلقة به أمام المحكمة الأوروبية . فهو ما بين أن تتبنى دعواه دولته، تماماً كما هو الشأن أمام المحاكم الدولية المعتادة كالمحكمة الدولية بلاهاى ؛ أو تتبنى

(٣) *Ibid.*, p. 195.

قضيته دولة ثالثة من الدول ذوات الصوالح عادة فى هذا النزاع (والتى تكون قد لجأت من قبل فى هذا الصدد إلى اللجنة وخاصة إذا كان النزاع مع الدولة التى يكون الفرد رعية لها) أو بحكم الواجب الملقى على عاتق الدول أعضاء الاتفاقية فى الدفاع عن الصالح الأوروبى العام فى صدد رعاية الحقوق والواجبات المعترف بها . وواضح مما تقدم أن هناك فارق أساسى بين إباحة الحماية والتدخل للدولة الأخرى فى نظام الاتفاقية الأوروبية وبين تحريم ذلك فى القانون الدولى التقليدى .

غير أن الفارق الأهم هو فى هــذا الدور الذى تستطيع أن تلعبه اللجنة الأوروبية لحقوق الإنسان أمام المحكمة ، وهو دور ليس له نظير أو مثيل فى إجراءات التقاضى الدولية الأخرى . فاللجنة كذلك أن تقوم نيابة عن الفرد بدور المدعى أو المطالب بحقوقه وحرياته ضد دولته أو أية دولة أخرى .

ومن ثم لم تعد القضية قضية تبنى دولة لمطالب فرد كما هو الشأن فى المفهوم التقليدى للحماية الدبلوماسية فى القانون الدولى الكلاسيكى ، والذى اتخذ صيغته الأساسية فى حق الدولة فى أن تكفل فى أشخاص رعاياها احترام قواعد القانون الدولى . وإنما أصبحت القضية قضية تبنى المجتمع الدولى الأوروبى عن طريق اللجنة الأوروبية كجهاز دولى محايد لمطالب هؤلاء الأفراد فى الدفاع عن حقوقهم وحرياتهم . وهكذا أصبح الأمر لا يتعلق بصالح الدولة التى يتبعها الفرد فى القيام بواجب الحماية الدبلوماسية من عدمه ، وإنما أصبح يتعلق بصالح هذا الفرد وصالح المجتمع الدولى الذى يتبعه بشخصه ككل فى الدفاع عن حقوقه وحرياته . وبالتالى ظهرت وظيفة كل من اللجنة أو الدولة المطالبة بحق الفرد فى تمثيله أمام المحكمة الأوروبية واضحة . وبمعنى أصح لم تعد بعد الحقوق التى تطالب اللجنة أو الدولة باحترامها حقوقاً للدول فى مفهوم الاتفاقية الأوروبية والمحكمة الأوروبية، وإنما هى حقوق للأفراد . وليس أوضح فى الدلالة على ذلك مما أتينا على ذكره من أن يكون التعويض عن الأضرار التى لحقت بالفرد نتيجة خرق حقوقه أو اهدار حرياته المعترف بها فى الاتفاقية هو كاملا من حق هذا الفرد وحده .

وهكذا يمكن القول كذلك بأنه منذ أن وجد الفرد في اللجنة الأوروبية ممثلا دولياً محايداً أو مستقلا له صفة التخصص الفنى وأهلية الاضطلاع بواجب الدفاع عن مصالحه ، وقد قل اعتماده على دولته أو اللجوء إلى إثارة حمايتها الدبلوماسية له . وجدير بالذكر فى هذا الصدد أن اللجنة الأوروبية ليست مطلقة الحرية فى أن تتبنى مطالب الفرد أو تشغل نفسها بالدفاع عنها ، كما هو الشأن فى قيام الدولة التى هو رعية لها بحمايته دبلوماسياً ، وإنما هى ملزمة بذلك طالما وجدت أن شكواه مقبولة أصلا وأن مطالبه مشروعة وصحيحة على النحو المشار إليه فيما سبق .

من ثم نستطيع أن نشبه وظيفة اللجنة فى هذا الصدد بوظيفة المحامى الذى قد تحتم بعض القوانين الداخلية (كقانون الاجراءات الجنائية أو لوائح التقاضى أمام المحاكم الإدارية العليا) وجوب توقيعه على عريضة الدعوى وتمثيل الفرد فى نظر الدعاوى أمام بعض المحاكم . غير أن اللجنة هى فى حقيقة الأمر بمثابة المحامى الأجنبى بالنسبة للتشريعات المحلية على اختلافها . ولهذا فان دورها هذا يخلع عليها صفة أخرى هى صفة الحياد ، بحيث تصبح إلى جانب دورها كمحام أو مدافع عن صالح الفرد ، تقوم بوظيفة أخرى شبه قضائية تحتم استقلالها فى محاولتها الوصول إلى تسوية ودية بين الأطراف المتنازعة ، أو أن تقوم فيما بعد بوظيفة هى غاية فى الدقة أمام المحكمة تجمع فيها بين وظيفتيها السابقتين ولا سيما إذا كان تقريرها عن وقائع النزاع ووجهة نظرها فيه هو فى صالح الدولة المشكو فى حقها وليس فى صالح الفرد . وليس هذا بدور غريب ، وإنما أصبح اليوم دوراً عادياً تلعبه أية هيئة أو محكمة تقوم بدورها فى الدفاع عن حقوق الأفراد أو فى تحقيق التكافؤ بين الفرد والدولة أو الفرد والمنظمة ، كما هو شأن المحكمة الإدارية لمنظمة العمل الدولية على سبيل المثـــال [1] .

---

(١) انظر فى هذا الشأن
F.A. Von Der Heydte, L'Individu et les Tribunaux Internationaux, *Recueil des Cours,* 1962, 101, pp. 327-329; Waldock, *Recueil Des Cours, op. cit.,* p. 206.

وأخيراً نستطيع على أية حال أن نتبين مدى التطور الذى لحق مركز الفرد أمام هذه المحكمة الأوروبية . فعلى الرغم مما يوجهه إليها البعض من نقد فى هذا المجال ، مفاده أن نظامها لم يتح للفرد أن يقوم بالتقاضى مباشرة كطرف من أطراف الدعوى أمامها[1]، إلا أن مركز هذا الفرد قد ارتقى مصافه ولا شك أمامها عما كان عليه الحال فى اجراءات التقاضى المعتادة من قبل ، حيث أصبح مركزه شبيهاً بمركز القاصر فى اجراءات التقاضى الداخلية . فلو أن هذا الأخير لا يستطيع أن يظهر بنفسه أمام المحكمة ، إلا أن أحداً لا يستطيع أن ينكر صفته وصالحه كطرف فى النزاع . ولعل هذا هو ما يؤكده النص الانجليزى للمادة ٤٤ من الاتفاقية حيث يقرر :

"Only the High Contracting Parties and the Commission shall have the right to bring a case before the Court."

ويستخدم النص الانجليزى للمادة ٤٨ من الاتفاقية نفس العبـارة *"to bring a case before the Court"* . ومفهوم ذلك أن لا يكون للجنة أو الدولة المعنية سوى حق الحضور وتقديم الدعوى إلى المحكمة ، دون أن تصبح ذات صفة أصلية أو مصلحة حقيقية فى النزاع ، أو إن شئت فقل دون أن تصبح طرفاً فيه كما يفهم مثلا من النص الانجليزى للمادة ١/٣٤ من النظام الأساسى لمحكمة العدل الدولية :

"Only States *may be parties* to cases before the Court"

حقاً أن النص الفرنسى للمادة ٤٤ من الاتفاقية الأوربية يستخدم عبارة "se présenter devant la Cour"

وهى نفس العبارة التى يستخدمها النص الفرنسى للمادة ١/٣٤ من النظام الأساسى لمحكمة العدل الدولية ، بما يفيد فى حالة الاتفاقية الأوربية أن الدول

---

(١) انظر على سبيل المثال

B.V.A. Roling, *International Law In An Expanding World*, Amsterdam, 1960, p. 119.

واللجنة هى وحدها التى تكون أطرافاً فى المنازعات أمام المحكمة الأوروبية . ولكن ما تلبث الاتفاقية الأوربية فى نصها الفرنسى أن تستخدم فى المادة ٤٨ ترجمة صحيحة للنص الانجليزى للمادتين ٤٤ و٤٨ حين تستخدم لفظ saisie بالنسبة لمن يحق لهم مجرد الالتجاء أو تقديم الدعوى إلى المحكمة الأوروبية[1].

وهذا فى حد ذاته شاهد واضح على أن هناك ثمة اتجاه وتطور بالغ الأهمية فى نطاق الاتفاقية الأوروبية — على خلاف ما عليه الحال فى النظام الأساسى لمحكمة العدل الدولية — بأن لا يعدو دور أى من اللجنة أو الدولة التى تتولى قضية الفرد أمام المحكمة الأوروبية أن يكون دور الوكيل بالنسبة للموكل ؛ بما يشهد كذلك على أن احتكار حق الولاية على صوالح الأفراد من قبل دولهم على الصعيد الدولى قد دخل بقيام اللجنة الأوروبية لحقوق الإنسان والمحكمة الأوروبية لحقوق الإنسان مرحلة من التقلص والضمور .

---

(١) انظر فى هذا الشأن وبشأن التفرقة بين النص الفرنسى للمادة ٤٤ وبين النص الفرنسى للمادة ٤٨ من الاتفاقية ، وكذلك بشأن المادة ٣٤/ ١ من النظام الأساسى لمحكمة العدل الدولية
Pinto, *op. cit.*, p. 187.
وانظر كذلك Vasak, *op. cit.*, pp. 172-181, 191.

مطابع كوستاتسوماس وشركاه
٥ شارع وقف الخربوطلي بالظاهر ج.ع.م
تليفون ٩٠٠١٦٨ س.ت ٦٣٤١١

FEDERATIONS

IN THE

MIDDLE EAST

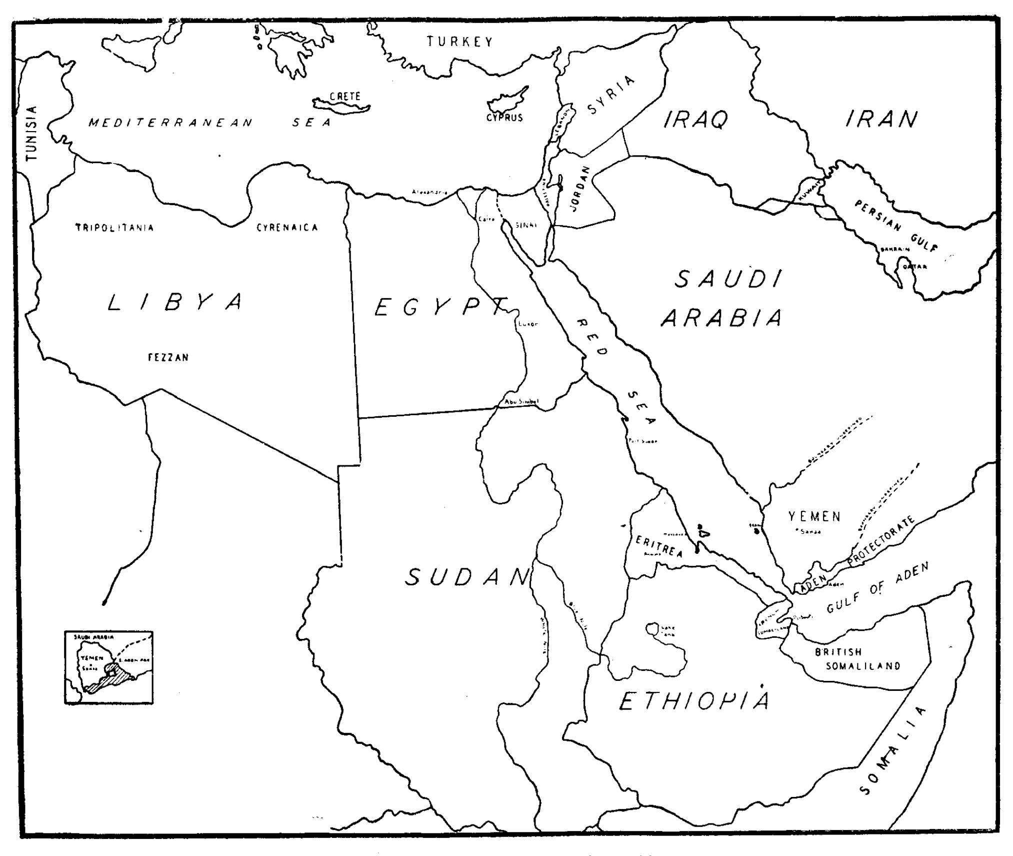
A DOCUMENTARY SURVEY

With a Note on the Evolution of Federalism in the Congo.

EGYPTIAN SOCIETY OF INTERNATIONAL LAW
Brochure No. 18 May 1964.

The Studies leading to this report were carried out under a research fellowship from the American Society of International Law, as part of a broader study program on the problems of Federations and other multinational associations. The printing of the report and documents attached has been made possible by a grant of the Ford Foundation to the Egyptian Society of International Law. The views expressed and information reported, are the sole responsibility of the author.

CONTENTS



AREA OF PROPOSED FEDERATIONS.

The Greek cities began to combine in alliances or federations for mutual protection. Not long after 300 B.C. two such leagues were already in existence, one on each side of the Corinthian Gulf. On the south side of the gulf was the Achaean League and on the north side that of the Aetolians. Such a league was in some ways a kind of tiny United States. The league had its general, elected each year and commanding the combined army of all the cities ; it had also its other officials, who attended to all matters of defense and to all relations with foreign States outside the league. Each city, however, took care of its own local affairs, like the levying and collection of taxes. But the two leagues were mostly hostile to each other, and while they were successful, for a time in throwing off Macedonian leadership, (it was too late for a general federation of all the Greek States) and a United States of the Greeks never existed.

The Conquest of Civilisation,
Breasted.

FEDERATIONS IN THE MIDDLE EAST

INTRODUCTION

A few years ago the writer was led to prepare, for the Egyptian Society of International Law, a critical analysis of the constitutions of the new West African States. The venture was an interesting one and when the Society's elder sister—the American Society of International Law—announced its program for a study of federation on a world-wide basis, it seemed only a natural extension of the earlier work to accept a small share in this larger project.

The contribution thus undertaken has been more troublesome than anticipated. In the case of the earlier review one had the advantage, thanks to the skill and industry of French editors, of a rich and finely edited documentation, covering the entire field, with expert commentary. In the present case even the most basic documents were often unavailable. They were not to be found in any library or in the files of diplomatic missions. Nor could they be secured in answer to written appeals. They had to be hunted down on the spot and when found, left much of the story behind them untold. This had to be uncovered through appeal to more personal sources.

The evasive quality as to documents was only the reflection of a similar quality on the part of the newly organized states themselves. The political kaleidoscope of the Middle East presents startling patterns. Situations change over night. One had no sooner completed a study of the amended constitution of Libya than it was announced that a completely new revision had just been made. A few months later the process was repeated. With Eritrea it was the same. Half way through a study of its federation, announcement was made that it existed no longer. It took a journey to the spot to survey the constitutional transformation. In the case of the Federation of South Arabia, old institutions were recreated and new treaties signed before it was possible to analyses the old ones. In Iraq and

Jordan a revolution wiped out a federation in a day of bloodshed. A similar shift of scene occurred in the case of the United Arab Republic where a closely organized unitary State has given place to a breathing spell and a search for a more effective form of union.

Another difficulty has been as to the use of terms to describe the various forms of political groupings. Political union is old in history but new in Africa. The Achaean League finds no echoes on the continent until the days of the Union of South Africa. When the idea finally began to spread throughout the continent, it assumed a variety of forms without precise definition but roughly corresponding to such English terms as Community — Federation — Confederation — League — Union — Entente. While these terms have more or less well defined meanings to students of political science, they are otherwise often loosely used. This is notably true in the case of "Federations" a term now generally understood to mean the system of dividing power so that the central and the regional governments are coordinate and independent,—the states equal in political status,—the federal power operating directly upon the individual,—the powers of the members substantial,—the system not subject to alteration by the will of one of the parties. None of the "federations" we shall examine, however, will be found to comply strictly with any such definition. The Arabic equivalent for "federation" (the original texts of most of the constitutions under review is Arabic), specifies merely a grouping or joining of States as contrasted with a single unit, and after all, as Wheare remarks, "framers of Constitutions are at liberty to use the federal principle in such manner and to such a degree as they think appropriate to the circumstances"—and in the Middle East they have done so.

In the course of his inquiries—and especially during his visits to the areas involved, the writer has received much courteous aid from both civilian and official sources. In Tripoli, his friend Frank Mefferd, Esq., opened many avenues of information and offered valued counsel. Former Justice Awni Dajani, of the Libyan Supreme Court, and in Beirut Maître Raymond Rabbath, placed at his disposal documentary material of much value. To his friends and colleagues in the Egyptian

Society of International Law—to Dr. Hamed Sultan, the distinguished Professor of International Law at Cairo University, to Dr. Boutros Ghali, a brilliant writer whose name is as well known in foreign circles as at home, to Dr. Ezz-el-Dine Foda, a scholar, who has made a notable contribution to the study of judicial organizations—the writer extends his thanks for their valuable assistance. He acknowledges also, with particular appreciation, the support of his friend and colleague, Judge Mokhtar Abdulla, a wise and temperate observer of world affairs, without whose encouragement this incursion into a politically contentious area would not have been undertaken.

Finally, the writer must record his sense of the incompletness of the material on which the present review is based. There are many gaps in information—especially as concerns the administrative experiences of the new States—which it would have been desirable to fill—but which has proved impossible within the limits of time and opportunity offered. It is not a case of freely pick and choose. One has to do one's best with the material actually available—and often it is tantalizingly inadequate. The present effort can hope to be a little more than a series of short case-histories with documents annexed, offering, as to one particular area of the world, some measure of material for further studies by other hands.

J. Y. Brinton.

LIBYA

LIBYA

Population 1,200,000
Area 680,000 sq. m.

Tripolitania	:	Population	800,000
		Area	353,000 sq. m.
Cyrenaica	:	Population	320,000
		Area	855,000 sq. m.
Fezzan	:	Population	58,000
		Area	55,000 sq. m.

CONTENTS

UNDER UNITED NATIONS SPONSORSHIP THE PEOPLES OF THREE RACIALLY HOMOGENOUS AREAS ESTABLISH A FEDERAL REGIME WHICH BY CONSTITUTIONAL PROCESS THEY LATER CONVERT INTO A UNITARY SYSTEM.

UNITED KINGDOM OF LIBYA

October 7, 1951

HISTORICAL BACKGROUND

The problems facing the founders of the present Libyan State were the outcome of a chequered political history. From the middle of the 16th century until the year 1911, when the Italian conquest of Libya began, the country was under Turkish rule. Italian domination, characterised by an intensive program of colonization and material construction, lasted until the defeat of the Axis armies in 1943. The Government of Cyrenaica and Tripolitania was then placed by Great Britain, as the Occupying Power, in the hands of the highly organized service of the Occupied Enemy Territory Administration — (O.E.T.A.) — and administered in conformity with the obligations of international law, maintaining, as far as consistent with military interests the existing administrative system of the country.

As early as June, 1949, the British Administration had agreed to the formation of a Cyrenaican Government with responsibilities over internal affairs. As to the southern area of the Fezzan, the situation was different. At the end of hostilities an agreement had been reached by the military authorities placing the territory under French military administration. In Cyrenaica, Italian influence had completely disappeared but in Tripolitania a large Italian population had remained, with the result that with the advent of independence, the three sections of the country found themselves moving along different approaches towards organized government. There was no intervening state cooperation ; no pre-existing government organisations ; each region was jealous of its new freedom ; above all the smaller population of Cyrenaica—which, under the leader of the powerful Senussi sect, Sayed Idriss, had stoutly resisted the invader and had stood on the side of the Allies, was suspicious of the far more populous Italian Colony to the west, which had yielded quickly in the struggle and was much farther advanced on the path of reconstruction.

The surrender of Germany in 1945 had made the fate of the former Italian colonies a responsibility of the victorious

Powers. By Article 23, of the Treaty of Paris, signed on September 15, 1947, Italy renounced all her rights to Italian territorial possessions in Africa, and it was agreed that their final disposal should be determined jointly, within a year, by the Governments of the United States, Great Britain, France and the Soviet Union. Such disposition was to be made "in the light of the wishes and welfare of the inhabitants and the interests of peace and security...." Failing agreement among the powers the matter was to be referred to the General Assembly of the United Nations. The Treaty also provided for the sending of Commissions of Investigation to the Italian colonies to ascertain the views of the local population. Such a commission visited Libya and reported that the people desired complete independence. Meeting in Paris in 1948, to review the findings of the Commission, the representatives of the Four Powers were unable to agree on a solution and the matter was accordingly referred to the United Nations General Assembly.

Many solutions were proposed—among them the Bevin-Sforza plan giving to Italy, Great Britain and France respectively, trusteeships over Tripolitania, Cyrenaica and the Fezzan. This plan, although much condemned in Libya, nearly secured the approval of the General Assembly. As a curious historical side-light, the issue was decided by the single vote of the representative of Haiti, Dr. San Lot, who, having abstained from voting in the First Committee which had approved the scheme, at the last minute joined the opposition in the Assembly. In recognition of his contribution to Libyan history two important Squares in Tripoli and Benghazi bear his name.

CONSTITUTION MAKING

The first step in the constitutional development of Libya is the resolution of the General Assembly of the United Nations on November 21, 1949, relating to the disposal of the former Italian colonies. The resolution reads :

> "1. That Libya, comprising Cyrenaica, Tripolitania and the Fezzan shall be constituted an independent and sovereign State ;
>
> 2. That this independence shall become effective as soon as possible and in any case not later than 1 January, 1952 ;

3. That a constitution for Libya, including the form of government, be determined by representatives of Cyrenaica, Tripolitania and the Fezzan meeting and consulting together in a National Assembly ;
4. That, for the purpose of assisting the people of Libya in the formulation of the constitution and the establishment of an independent government there shall be a United Nations Commissioner in Libya, appointed by the General Assembly and a Council to aid and advise him."

The implementation of the Resolution took the form of the appointment by the General Assembly on December 10, of Mr. Adrian Pelt, a Dutchman, to the post of United Nations Commissioner, and the naming of an Advisory Council of ten members to aid him. The membership of the Council included representatives of Egypt, Britain, France, Pakistan, Italy and the United States, as also of each of the three territories and a representative of the Libyan minorities.

The appointment of Mr. Pelt as Commissioner proved to be a happy one. His task was singularly delicate. The reports which he submitted to the General Assembly are models of tact and comprehension. A significant mark of the appreciation with which his services were received is seen in the fact that, following in the wake of Dr. Lot—whose honour was more easily gained—the two important sea-front roads of Tripoli and Benghazi are now called Adrian Pelt Street.

As will be observed, the resolution left the form of government to be determined by the peoples involved. There were a number of controlling features in question. Most important was the differences in the composition of the various national groups.

According to the first Report of the Commissioner to the United Nations, whereas the population of the Cyrenaica was a homogeneous body, comprising some 300,000 Muslim Arabs, with a few hundred Greek and Maltese, the population of Tripolitania was distinctly heterogeneous, having in addition to 730,000 Muslim Arabs, some 45,000 Italians, 13,000 Jews, 4,000 Maltese and a sprinkling of Greeks, the total population of both areas together being slightly over a million. As to the Fezzan, the population, largely nomadic, and under the rule of local chiefs, was estimated at roughly 50,000.

The procedure followed in the drafting of a Constitution was the appointment of a Committee of Twenty One, including seven representatives from each of the territories. A month prior to its first meeting on July 27, 1950, the Committee received from a special Committee representing Cyrenaica, what appears to have been the first official suggestion as to the adoption of a federal form of government, an action which reflected their conviction that only by such means could their political identity be preserved in the face of the far larger population of Tripolitania. This position was in direct opposition to the Tripolitanian pressure for the creation of a unitary State.

While Cyrenaica and the Fezzan favoured respectively the establishment of a federation—and a confederation—their common opposition to the claims of Tripolitania, and the fact that all parties were united in the choice of the Senussi leader as the future head of the State, determined the issue. On May 7, 1950, the Committee adopted the proposal of Cyrenaica that the National Assembly should be composed of an equal number of delegates from each territory, a decision that in effect assured the adoption of the federal principle.

On the recommendation of the Committee of Twenty One, the General Assembly of the United Nations, on November 27, 1950, recommended the convening of a National Assembly for the adoption of a Constitution not later than January 1, 1951, which should set up a provisional government by March 1, of the same year, to which should be transferred "all powers exercised by the administering power." The Assembly composed of sixty members representing the three provinces met in Tripoli, in which is now a Royal Palace, on November 25th. Shortly thereafter it decided to send to the representative of the Arab League, then meeting in Cairo, a report which recommended the adoption of the principle of federalism, and observed :

> "The National Assembly is inclined to establish a federal system nearer to unitarianism than federalism, by way of constituting a central government in which the ministries of Foreign Affairs, Finance, Defense, Communication, Education, Currency and Justice are located ; and the establishment of local administrations in each of Cyrenaica, Tripolitania and Fezzan. In each of these territories, there

will be a legislative body and a local administrative organisation, whose competence will be limited to purely internal matters in accordance with the powers defined in the Constitution, while at the same time there will be constituted a central bi-cameral parliament, one representing the people as a whole in accordance with the principle of proportional representation. The other, the senate, should represent the three provinces on an equal footing, thus being anologous to democratic parliaments in the existing federal states."

On December 2nd, 1950, the Libyan National Assembly adopted by acclamation, a decision to establish Libya as a Democratic Federal State—the form of government to be a constitutional monarchy—with His Highness the Emir El Sayed Mohamed Idris Al Mahdi Al Senussi, as the constitutional King. This decision took the form of a proclamation signed by all the members of the National Assembly. Opening with a verse from the Holy Koran its Preamble includes the following:

"Determined to create unity among us and to establish a Democratic, Federal, Independent and Sovereign State, its form of government being a constitutional Monarchy."

Two weeks later the acceptance of the King was signified in an equally formal document, and the National Assembly entered upon the work of constitution-making. Two groups were set up—the Working Group, composed of six members, two from each province, and the Constitutional Committee composed of eighteen members, six from each Province. The Working Group drafted each section of the Constitution, to be reviewed by the Constitutional Committee. In its work the group made use of the constitutions of various federal and unitary States of the west, and of the United Nations Universal Declaration of Human Rights. The resulting draft was then submitted to the National Constituent Assembly for adoption after three readings. Later the draft text of the Constitution was submitted to the National Constituent Assembly and on Sunday, October 7th, 1951, in a historic meeting attended by the King, the Assembly finally adopted the Constitution of Libya. On December 24th, 1951, the King formally proclaimed to the people of Libya, and to the world, that Libya had become an independent and sovereign State.

The Constitution before its recent amendments comprised twelve chapters. The form of government which, as will be seen, has been completely modified as to its federal aspect, was defined in its first three articles as follows :

> "1. Libya is a free independent sovereign State. Neither its sovereign nor any part of its territories may be relinquished.
>
> 2. Libya is a State having a hereditary monarchy, its form is federal and its system of government is representative. Its name is "the United Kingdom of Libya."
>
> 3. The United Kingdom of Libya consists of the Provinces of Cyrenaica, Tripolitania and the Fezzan."

Chapter Two in its thirty-five articles, contains an exceptionally specific and detailed declaration of the rights of the people ; it defines Libyan nationality ; establishes personal liberty and provides that "no Libyan may be deported from Libya under any circumstances nor may be forbidden to reside in any specific place or prohibited from moving in Libya except as prescribed by him". The guarantee of freedom of conscience is "absolute" ; freedom of thought is also guaranteed—and the right of the expression of opinion and its publication—"But this freedom may not be abused in any way which is contrary to public order and morality." A free choice of language is assured in private transactions, in religious and cultural matters, and in the press or any other publications and in public meetings. The penalty of general confiscation of property is prohibited.

> "Property shall be 'inviolable'. No owner may be prevented from disposing of his property except within the limits of the law. No property of any person shall be expropriated except in the public interest and in the cases and in the manner determined by law and provided such person is awarded fair compensation."

Chapter III, which bore directly on the federal character of the State, covered the vital subject of the distribution of powers between the Federal Government and the Provinces *(later abolished)* to which we shall refer in some detail below. Chapter IV, General Federal Powers, conferred broadly the Legislative, Executive and Judicial Powers respectively on "the King

in conjunction with Parliament"—on the King "within the limits of the Constitution"—and on the "Supreme Court and other Courts...." A later article (Art. 41) provides that when the exercise of a legislative, as distinguished from an executive power is involved this is to be "exercised by the King in conjunction with Parliament." Chapter V, prescribes the powers and prerogative of the King, which have remained substantially unaltered by the recent constitutional amendments. Chapter VI covers the duties and rights of Ministers. Chapter VII establishes the National Parliament comprising a Senate and a House of Representatives—the Senate to consist of twenty-four members, eight from each Province, one half of whom were to be appointed by the King, the other half to be elected by the Legislative Councils of the Provinces, and the House of Representatives to include one deputy for every 20,000 inhabitants elected in accordance with the provisions of a federal electoral law. Chapter VIII—the Judiciary, calls for the general judicial organisation to be determined by a federal law and established a Supreme Court whose members were to be appointed by the King. The number of justices is not specified; the compulsory age limit for retirement is sixty-five. The Supreme Court was exclusively competent to hear disputes between the Federal Govrnment and the several Provinces (these latter no longer exist). The Court might also be invited by the King to render advisory opinions "on important constitutional and legislative questions," Chapter IX—Federal Finance has been extensively amended. Chapter X—The Provinces has been superseded by recent amendments as explained hereafter. Two final Chapters, XI and XII, covered various General and Transitory Provisions respectively, including the procedure of constitutional amendment.

FOREIGN RELATIONS

The powers of the Federal Government as to foreign relations was exclusively reserved to the Federal Government both as to executive and legislative action. Thus, after specific mention of diplomatic and consular representation, affairs of the United Nations, participation in international conferences, matters of war and peace, treaties and agreements with other

States, trade with foreign States, foreign loans, extradition, passports, immigration, admission and expulsion of foreigners and nationality, we find in the Constitution the catch-all phrase "all other matters relating to foreign affairs". The expression of the will of the Provinces in these matters was confined to the activities of their several representatives in the National Parliament in such matters as the approval to be given in the case of treaties (Art. 69)—and the assumption of a throne outside Libya (Art. 61). Parliament has no role to play in the appointment by the King of diplomatic representatives.

TRANSFER OF POWERS TO LIBYAN GOVERNMENT

The proclaiming of the Constitution was accompanied by measures for the prospective transfer of existing powers. These were divided into several groups according to their urgency—those which called for little or no financial implications being taken care of first. Others involving grants in aid by Great Britain and France called for further negotiations with these powers and authorization from the parliaments of these countries. Among the immediate problems that had to be faced were the unification of currencies, the adoption of a unified national budget, the establishment of the Libyan Development and Stabilization Agency and Libyan Finance Corporation and the inauguration of a United Nations Technical Assistance Program.

Meanwhile a cabinet had been formed and Royal Decrees had been issued appointing governors (known as Walis) for the Provinces, and an order was promulgated replacing the Council of Regency in Tripolitania by a Royal Council.

THE CONFLICT OF POWERS

Such, in outline was the constitutional system which governed the new Kingdom of Libya during the first eleven years of its existence. It was a federal system resulting from compromise—in which, in the absence of practical experience, much had to be left to the test of workability, and to the stresses and weaknesses and human problems inherent in the administration of a sparsely settled and underdeveloped country of very limited resources and poor communications.

It is not surprising that as time went on cracks were to develop in the elaborately designed structure calling for radical repairs.

The difficulty arose in the matter of the distribution of powers between the Central and Provincial Governments. As indicated the general scheme established two categories of powers.

In the first category, designated as Federal Powers (Art. 36), were found thirty-nine topics as to which both legislative and executive authority was committed to the Federal Government. These included all those matters which would normally fall within the purview of federal action, as already indicated, to which was added a proviso that the Federal Government might by agreement with any Province, delegate to it or its officers the "executive power" in any matter within its competence, the Federal government bearing the expense.

In the second category of—Joint Powers (Art. 38)—were placed a series of twenty-seven topics, as to which legislative and executive power was *divided* between the Federal Government and the Provinces.

The list of such Joint Powers was as follows:

(1) Companies.
(2) Banks.
(3) Organization of imports and exports.
(4) Income tax.
(5) Monopolies and concessions.
(6) Sub-soil wealth and prospecting and mining.
(7) Weights and measures.
(8) All forms of insurance.
(9) Census.
(10) Shipping and navigation.
(11) Major ports which the Federal Government considers to be of importance with regard to international navigation.
(12) Aircraft and air navigation, the construction of airports, the regulation of air traffic and the administration of airports.
(13) Lighthouse, including lightships, beacons and other provisions for the safety of sea and air navigation.
(14) The establishment of the general judicial organization subject to the provisions of Chapter 8 of this Constitution.

(15) Civil, commercial and criminal law, civil and criminal procedure, the legal profession.
(16) Literary, artistic and industrial copyright, inventions, patents, trademarks and merchandise marks.
(17) Newspapers, books, printing presses and broadcasting.
(18) Public meetings and associations.
(19) Expropriation.
(20) All matters relating to the national flag and the national anthem and official holidays.
(21) Conditions for practicing scientific and technical professions.
(22) Labour and social security.
(23) The general system of education.
(24) Antiquities and archaeological sites and museums, libraries, and other institutions declared by a federal law to be of national importance.
(25) Public health and the co-ordination of matters relating thereto.
(26) Quarantine and quarantine stations.
(27) Conditions for licences to practice the medical profession and other professions connected with health.

As will be readily seen the list includes many matters which would normally fall within the exclusive scope of a federal authority. As to *all* of these, however, a division as between legislative and executive authority was prescribed in the following terms :

> "In order to ensure a co-ordinated and unified policy between the Provinces, the legislative power relating to the following matters shall be within the competence of the Federal Government, while the executive power in connection with the implementation of that legislation shall be within the competence of the Provinces acting under the supervision of the Federal Government."

Matters were further complicated by the provision made in a later Article (173), for the distribution of the revenue arising from the execution of the given powers, as follows :

> "Each Province shall have the revenue from taxes and fees accruing from matters within its competence in accordance with Article 39 of this Constitution, and also from matters within its executive competence in accordance with article 38 of this Constitution."

An illuminating commentary on this serious conflict of authority is offered in the form of an advisory opinion rendered by the Supreme Court of the country in 1955, on the request of the King, pursuant to the provisions of Art. 152 of the Constitution (later revoked) which read :

> "The King may refer important constitutional and legislative questions to the Supreme Court for an opinion ; the Court shall examine such questions and inform the King of its opinion, taking into account the provisions of this Constitution."

Two questions were presented to the Court—*First*, a question as to the extent of the powers of the Wali, or local governor and the extent of his jurisdiction. *Second*, as to the constitutional meaning and usage of the word "supervision" in relation to the power of the Federal Government over the actions of the provincial authorities. On the first of these questions the Court presented a significant summary of the nature of the conflicts that had recently arisen :

> "The Court has taken notice in previous opinions and deliberations, however, of situations of fact which may be considered to be typical sources of issues of law such as those now presented for the Court's opinion. For example, the Wali of Tripolitania, acting under Article 70 of the Organic Law of Tripolitania (Amendment and Approval) 1954, was reported to have assumed to exercise the power to "grant pardon and remit or commute sentences", although, as this Court has pointed out in a decision, Article 77 of the Constitution of Libya specifies that it is the King who "shall have the right to grant pardon or to commute a sentence." It is reported also that there have been cases in which the Federal Minister of Education proceeding under article 38 of the Constitution requested but failed to obtain essential official provincial information from a provincial Nazir of Education. It is common knowledge, moreover, that in the federal states having supreme courts there arise common or typical situations of fact in which these courts are called upon to help officials of the federal government on the one hand and officials of the local or provincial governments on the other hand to find the constitutional boundaries and balances between them. Such common or similar factual situations may be usefully kept in

> mind in dealing with requests not accompanied by specific statements of fact."

The answer offered by the Court was first directed to an interpretation of the word "represents" in Art. 181 of the Constitution :

> "The Wali shall represent the King within the Province and shall supervise the implementation of the Constitution and of the federal laws therein."

To this inquiry the Court replied that the language used did not mean that the Wali stood, even locally or temporarily in the place of the King or that he personified the King or enjoyed any of the latter's privileges or powers. On the contrary, as in the case of members of Parliament ("each member of Parliament represents the whole people." Art. 108) the word clearly has its common usage—namely "to serve with delegated authority or in a special capacity"—and to the effect, in the present case, that if the Wali failed to 'represent' the King and the federal government efficiently and loyally, the Council of Ministers could submit the matter to the King, who might remove him.

On the second question submitted, as to the practical interpretation of the word 'supervision' as it appears in the same text, the Court examined the phrase under the three different aspects of 'common meaning' — 'intended meaning' — and 'the practice in other federal nations.'

As to the 'common meaning' of 'supervision' the Court found that the interpretation—"to oversee for direction" was supported in the dictionaries of various languages—Arabic, English, French and German. Under the heading—'intended meaning' the Court emphasized the general purpose expressed in Art. 38 "to ensure a co-ordinated and unified policy between the provinces"—which the draftsmen could not have expected to achieve if they had failed to place a single competent authority over the three provinces implementing and executing the federal legislation. The Court also referred to the historical fact of the aim of the Libyan people "to unite in a strong free and sovereign State"—and to "make secure their individual personal freedom against a possible future totalitarian unitarian

over-centralized government"—a desire which had resulted in the adoption of the federal form of government. Finally as to the 'practice in other federal nations'—reference was made to the Constitutions of some sixteen states in which the supremacy of the federal government has been clearly asserted, followed by a reminder that the difficulties now being encountered were only similar to those of other federal nations.

The opinion of the Court concludes with the following paternal admonition, which, if not carried out quite as promptly as the court may have contemplated, proved to be prophetic of the good-will and good sense which has led the Libyan government forward on an ordered constitutional life.

> "And all of the foregoing is to be carried out in an atmosphere of cooperation and reciprocal support, which above all, is the pillar of success of the federal system."

THE GOVERNMENT'S APPROACH

It scarcely requires hindsight to see in this abnormal division of authority a serious obstacle to efficient administration and one is naturally led to wonder how it should have been accepted.

The reasons seem to have been both political and economic. On the political side we have the difficulties already referred to of persuading the representatives of the more highly organized region of Tripolitania to surrender any measure of local autonomy. On the economic side we have the government's own explanation as presented in the Memorandum *(see Documents)*, submitted to Parliament in 1962 accompanying the proposed constituional amendment which was later adopted, and which we shall examine below. The explanation reads :

> "For economic reasons, owing to the fact, as we believe, that the country was in its first stages of independence, it was considered undesirable that the Federal Government should be responsible for the administration of those interests and bear the burden of them while it did not yet know the extent of its financial strength and to what degree it could be expected to shoulder the burden of all that was entrusted to its competence."

Later, the Memorandum, with obvious reference to the improvement of federal resources through the recent discovery of oil, observes : (1)

> "The time has now come for the Federation to take up its responsabilities in full, which, with the means at its disposal, it is well able to do. In doing this and taking over these powers, the Federation will be strengthened. In the strengthening of the Federation is a strengthening of Libya in all its three Provinces."

In its memorandum the Government careful, however, to disclaim any intention "to rob the Provinces of their rights and take them to itself, nor does it desire to enlarge its own sphere of competence, at the expense of the Provinces. Equity demands that the proper situation is that the Federation should undertake its full competence in all matters in which it was originally to have assumed it at the time when the Constitution was drawn up."

As to the practical difficulties which had been encountered in the running of the administrative machine, we again have the Governments explanation. The memorandum reads :

> "The practical application of Article 38 has raised various problems and many difficulties. At times both the Provinces and the Federal Government claim competence over a single question. At other times a Province is in dispute with the extent of the Federal Government's right of supervision, which makes a proper degree of supervision impossible. Efforts have been made in vain to define this, and the public interest has been liable to be lost sight of in discussions on the questions of competence and the extent of the right of supervision. Things thus became complicated in many matters : the problems and difficulties remained and the years passed and they still remained unsolved. This has led from time to time to voices being raised calling for an amendment of this Article, though they may have been faint at first. However, with the passage of the years the difficulties of application have become

---

(1) Several companies are now actively engaged in production and in prospecting. Much of the development has been in the region of Cyrenaica where the Oasis Company and E.S.S.O., a subsidiary of the Standard Oil Company of New Jersey, are building new towns and pipelines.

> tremendous and have proclaimed the fact that all is no longer well in our Constitution. There is small wonder that these voices should have come to gain a hearing and to call for a speedy amendment and improvement."

The existence of the tensions broadly indicated in the Memorandum are confirmed by conversations which we have had with leading officials. In every branch of federal effort which involved provincial co-operation, difficulties were encountered. Imports and Exports—the control of Banks—the activities of Foreign Corporations—all suffered from lack of co-ordination between federal and provincial agents. Applications submitted to the Provinces requiring the approval of the central government were retarded in transmission. The central government was without authority to give orders to the provincial officials. Government agents and inspectors were not welcome. The Provinces were in a position to exercise an effective veto over much of the government policy and did do so. The division of authority was impractical. The situation was well summarized by the Foreign Correspondent of *The Economist* (Feb. 2, 1963).

> "The Libyan federal system was extremely cumbersome and absurdly expensive. It gave the central government very little power ; the federal police for example were mainly concerned with such administrative matters as the supervision of immigration and the residence permits of foreigners. Each province had its own civil service and its own local defence force or police. Such a system was justified not on its merits but as the only means of creating a united state out of three widely separated regions each of which had had an established and autonomous existing administration."

PETROLEUM

As might be expected the joint control in the field of petroleum development was especially productive of conflict, to say nothing of the fact, as our correspondent observes, that with the rapid increase in oil reserves "the provincial governments, free from the restraining influence of financial stringency, might well have been tempted to embark on pet schemes of their own."

Oil had been struck in the Cyrenaica area shortly after the creation of the Federation and had been made the subject of

the Petroleum Law of 1955, the first article of which had declared that all petroleum in Libya in its natural state in strata is the property of the Libyan State and had set up a Juridical Petroleum Commission for the granting of oil permits and concession deeds. Article 15 of the law provided that all fees, surtax rents, royalties and surtaxes and income tax levied under this law should be paid to the Commission, such payments to be transmitted to the appropriate authority. Here in the face of the constitutional provision (Art. 173), under which each Province was to "have the revenue from taxes and fees" from matters "within its executive competence in accordance with Article 38"—which included "(*a*) Sub-soil wealth and prospecting and mining"—was a prolific invitation for conflict. What was to be understood by taxes and fees ? And what about royalties ?

The Government's interpretation was clarified in its Explanatory Memorandum to the Petroleum Royalties Law of 1958, which also considerably modified the rates of the previous system, and established the rights of the Provinces as follows :

Article II

The Petroleum Commission shall pay over to each Province the following amounts :

a) Tax on income produced within the administrative boundaries of the Province.

b) Fees for the issue of preliminary reconnaissance permits and concession deeds in respect of areas falling with the administrative boundaries of the Province.

c) One-third of other fees collected by the Petroleum Commission under the Petroleum Law.

Article III

The amounts collected by the Petroleum Commission as rents, royalties, or additional sums payable under the referred to Petroleum Law, shall be distributed in the following manner :

a) 70 % to reconstruction and development affairs in Libya through the Reconstruction and Development Council.

b) 15 % to the Federal Government.

c) 15 % to the Province from within the administrative boundaries of which petroleum is extracted.

The Memorandum declares that the "fees" specified in the Article are the fees levied on the issue of permits and concessions, and the "income tax" the tax imposed by financial laws on the income of the concession holder company as one of the sources of its wealth, within the country.

As to royalties the Memorandum observes:

> "Royalties as defined in petroleum jurisprudence represents a part of the crude petroleum extracted, which is owned by the granter of the concession—the State—from the time of its extraction. It is not at all related to the profits or losses of the Company as the grantor of the concession has the right to take it originally in kind not in cash."

The amount of royalty fixed under the law of 1955 was 12½ % of the value on the field of productivity, provided that if, in any year, royalties and taxes fell short of 50 % of a company's net profits, payments should be increased up to that amount "in appreciation of the principle of equal division of profits between the company and the State, which is the principle followed by the majority of petroleum producing countries." In further justification of the proposed distribution of revenue, the Memorandum points out that:

> "In America, the petroleum producing country, it happens that petroleum is found in the strata of land owned by individuals, and thereupon the rents, the royalties and the additional sums are paid to those individuals, and the Government is not entitled except to taxes and fees. For this reason, it will be contrary to fact to consider this increase which forms a part of the Government's share in petroleum as an original and additional tax."

The memorandum concludes with a reference to the allocation of the accruing funds to the financing of vital development projects, mentioning by way of illustration, the example of the Reconstruction and Development Council and Ministry of Iraq.

The solution proposed by the Government to relieve this unhappy conflict was the resort to the constitutional process of amendment. The Government's Explanatory Memorandum observes that this step was welcomed as a normal procedure :

> "It is superfluous to point out that this new amendment is not unprecedented. In truth and essence, part of it is only a formal amendment by which its original powers are restored to the Federal Government. As for the other part, it is an accepted principle that constitutions in every country have been drawn up to organize the affairs of society which is by nature evolutionary. This necessitates amendments in Constitutions whenever there is the need to facilitate the development of society."
>
> The most cogent proof of this is that those who drew up the Libyan Constitution themselves anticipated its amendment to suit the conditions and circumstances of the country, which is a natural thing, and indicated the manner of amendment and pointed the way in Articles 196 onwards.
>
> For these reasons that have been set forth, the accompanying legislation was prepared, since it was considered that there was no escaping the requisite amendments to simplify matters and set things in order."

Two methods of procedure for its amendment were provided in the Constitution. The first—a general power (Art. 198)—covered "the purpose of reviewing the Constitution" and called for an absolute majority of both national chambers with two-thirds of the members of each chamber voting. Amendments required the signature of the King.

The second category (Art. 199) related to a fundamental change in the federal system. The English translation reads "In the event of a review of the provisions concerning the federal form of government...." In such case the amendment required, in addition to parliamentary approval, the approval "of all the Legislative Councils of the Provinces".

It is interesting to note that this procedure had been thought by the Commissioner to be unduly exacting. He has observed : (1)

---

(1) "Constitutional Development in Libya". Khalidi, Beirut. 1956. p. x.

"...the Commissioner had advised a procedure of constitutional amendment which would have made it possible, but not too easy, to introduce changes which in the light of experience might reveal themselves desirable. This advice was not followed, for various reasons. Certain members of the National Assembly feared that a procedure for easy revision might some day endanger provincial autonomy ; others believed that it might prove harmful to the position of the Throne, and finally there was an underlying apprehension that the former Administering, or other Foreign Powers would perhaps use their influence to seek changes in conformity with their particular interests. For all these reasons, the vast majority of the National Assembly was in favour of making revision as difficult as possible, a tendency which resulted in Articles 195 to 199 of the Constitution."

REDUCTION OF POWERS OF THE PROVINCES

The principal amendment proposed was the simple one of abolishing the executive powers of the Provincial Governments in relation to the joint powers and of incorporating them in the list of exclusive federal powers to which were added a few new subjects of legislation. At the same time the necessary amendment was made in regard to the receipts from taxes and fees formerly accruing to the Provinces in such matters and which were made payable to the Federal Government, leaving to the Provinces only the fees and taxes arising from their small and uncertain residuary powers.

REDUCTION OF POWERS OF LOCAL GOVERNORS

Another amendment in conformity with these provisions related to the Wali—the provincial governor. His status which had been compared with that of a viceroy was much reduced. It was to be no longer necessary for this official to supervise the execution of federal legislation. In place of these duties he was made the head of a new Administrative Council which replaced the former Executive Council, but was held responsible before the Legislative Council in the province.

In its Memorandum, however, the Government takes occasion to remind the Provinces of its full acceptance of the obli-

gations imposed by Article 174 of the Constitution to allocate to them sufficient funds to enable them to discharge their obligations and adds its fraternal blessing in these terms :

> "The Federal Government feels itself in the position of elder brother with his other brothers, taking them by the hand and helping them to overcome the difficulties facing them, wishing them well-being and prosperity."

CENTRALIZATION OF JUDICIAL POWER

A further constitutional amendment was made in relation to the exercise of judicial powers. Under the Constitution, as it stood, the "establishment of the general judicial organisation" subject to the provisions of the Constitution relating to the rights of the people in Article 8, together with the subject of civil, commercial and criminal law, was one of the joint powers. This power having been transferred to the exclusive jurisdiction of the Federal Government, it was decided, to quote the language of the Memorandum, that there was "no longer any justification for keeping the judiciary power in the Provinces." Article 85, providing that "judiciary power shall be exercised by the legal tribunals in the Provinces in accordance with the provision of this Constitution" was accordingly deleted. The proposed amendments received the unanimous approval of the National Assembly. As it was felt that they did not involve any such fundamental alteration in the powers of Government as to require the approval of the Provincial Councils, they therefore received the royal approval and were promulgated as part of the Constitution.

ABOLITION OF THE FEDERAL PRINCIPLE

The popular approval of the amendment was a clear warning that the tide in Libya was running strongly towards a unitary rather than a federal form of government. The struggle between the two tendencies had been noted early in the history of the new Government by Dr. Khalidi, [1] who writes :

---

(1) Khalidi. op. cit., p. 73.

"Although the forces of federalism and unitarianism made compromises in order to produce a working Constitution, and although this was no doubt done in good faith, there can be no question that the writing of the Constitution did not fully resolve the strong divisions between the two elements."

A similar view was expressed by the former United Nations Commissioner himself, in his introduction to Dr. Khalidi's work :

"It is, for instance, an open question whether the federal concept with the substantial amount of authority in the hands of the provincial authorities was not pushed too far with the result that the cost of the provincial administrations represents too heavy a burden on the economy of a country that is admittedly poor."

The Tripolitanian Legislative Council had already placed itself formally on record on the subject. In adopting the Organic Law implementing the constitutional amendment, the Council, on January 6, 1963, adopted a resolution requesting the King to further amend the Constitution and completely abolish the federal form of Government and declare Libya to be a unitary State. The action of the Tripolitanian Legislative Council proved to be prophetic. On April 26th 1963, the program of centralization was completed by the official proclamation, after approval of the three provincial councils, of a series of amendments which effectively abolished the federal form of government in Libya. The amendments were in purport as follows :

1. A change in the name of the State by omitting the word 'United' ; also the abolition of federalism by the striking out of all reference to 'federalism' and the word 'united' wherever it occurs in the Constitution. The three provinces are ipso facto abolished.

New administrative divisions are to be established by special legislation. This has been done and the country is divided into ten districts, five for Tripolitania, three for Cyrenaica and two for Fezzan. Each district is in turn divided into three administrative divisions.

2. A declaration that Libya is a part of the Arab Homeland and of continental Africa—the idea being that she would thus be in a position to participate in any form of African union.

3. A reference to the concept of sovereignty as expressed in the Constitution which now reads that sovereignty is in Almighty God and is the trust of the nation which is the source of all power and has entrusted power to King Idriss (by name) and to his male heirs, as before.

4. Modification of the system of appointment of members of the Senate all are now to be appointed by the King. Formerly one half of the members were elected and the other half appointed.

5. Extension into the field of justice of the consequences of the abolition of the provinces and the unification of the courts, there being no longer any occasion for provincial courts.

6. Establishment of woman suffrage.

The Explanatory Memorandum *(v. Document 4, p. 61)* issued by the Prime Minister justifies in some detail a number of these modifications. It opens with a reference to the popular reception given to the constitutional amendments of 1962, and proceeds to a summary of the defects of the earlier system—notably the duplication of administrative machinery as between the Provinces and the Federal Government with its consequent heavy financial drain on public funds. Effective central control in the matter of audit had also become unpracticable.

In passing, the Note makes the following significant reference to what is taken to be the normal role of a federal system as a transitional stage towards a more closely unified state.

> "It is needless to outline that the adoption of the system of the single unified State is not a novel creation or contrivance in our country. It is admitted and recognized in constitutional jurisprudence that the switching of a State from the Federal System to a full singly unified State rather than to a Union or United system is only a natural phenomenon and the usual end which the federal system leads to."

As to the proposed structural amendments, while a defence is offered of the principle of two legislative chambers, an interesting statement is given of the reasons for the proposal to have the members of the Senate appointed, *viz.*, in order to place alongside the members of the House :

> "A group of persons who are able through their personal prestige, qualifications and past national and

patriotic services to give due weight to their opinions in view of the knowledge, national credits and the experience they have attained from the work they have previously experienced—and thus they can introduce into the political life sage and mature opinions and judgments as well as sincere sentiments. However, many of these refuse to bring themselves to enter election campaigns for the House of Representatives, and therefore in many countries the doors of the Senate are opened for them by appointing them to its membership. In this way, the representation of the nation by such Senators is best accomplished."

To this is added the observation that the number of Senators as already fixed at twenty four, should not be increased,

> "for it is a recognized fact, that the more the number of members the less useful are the discussions and the weaker is the independent and mature opinion."

Doubtless the emphasis thus laid on the advantage of appointing Senators is largely due to the general confidence felt in the country's ruler.

The democratic spirit of the new regime is reflected in the abolition of civil titles. The Memorandum observes:

> "The established fact is that the King did not, since the dawn of independence up to now, use his right in conferring civil titles such as the title of Bey or Pasha. In addition, these civil titles no longer suit the developments of the modern age. Thus, the text was amended to conform with this objective and abide by the wise policy followed by the King. This amendment, therefore, is proper and acceptable and agrees with the democracy of Islam and the principles of equality therein."

On the question of woman suffrage we read:

> "The woman is half of society, and modern legislation has been inclining towards giving the woman her natural right in participating in public life. She has occupied public positions and the doors of the University have been opened for her. Therefore, to proceed with the development it has become inevitably necessary to give her the right to vote."

The Memorandum closes with the following pragmatic and temperate reminder of the requirements that a constitutional system should adapt itself to the changing situations of a people.

"Finally, it is an admitted fact that the success of the organic law in the State depends upon the extent of its suitability to the customs of the inhabitants in their original environment. The provisions of the Constitution in any state are enacted merely for guaranteeing the national interests, and for preparing the way for the establishment of internal justice and tranquility, the means of defense, the protection of the sovereignty and the safety of the State, and to guarantee the principles of liberty and equality.

To the extent the Articles of the Constitution accomplish the above purposes and pursue these ends and objectives, the judgment on the soundness and success of the Constitution will be placed.

We should not overlook the fact that what is suitable to a specified State at a specified time may not be suitable to that State at another time. The Parliamentary system, like other systems of government, does not grow and develop unless it finds the proper environment which is suitable to it. All the desires have met in the selection of the unified single state system for our country."

Official proclamation of the amendments occurred on April 26th, and the following day, April 27th, was declared an official holiday "Feast of Unity". Thus in an atmosphere of harmony and in perfect order, the Federal Experiment in Libya was brought to an end. But it does not follow that the experiment must be counted as a failure. In the light of events it became clear that the federal system was not adapted to the administration of the homogeneous community to which it was applied. It imposed too heavy a burden in money and man power—it was wasteful, complicated and inefficient. But was there at the time a better alternative? This may be doubted. The separate communities labored under divisions which were largely the legacy of diversified military occupations. These divisions had set up artificial boundaries which could not be suddenly obliterated. Federation offered, at the moment, the only acceptable solution and it had impressive precedents. And, after all, as a transition form of government, it at least succeeded in the founding of a State.

LIBYA

Documents

CONTENTS

RESOLUTION OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS

4th Session — 21 November 1949

The General Assembly,

With respect to Libya, recommends :

1. That Libya, comprising Cyrenaica, Tripolitania and the Fezzan, shall be constitued an independent and sovereign State ;

2. That this independence shall become effective as soon as possible and in any case not later than 1 January 1952 ;

3. That a Constitution for Libya, including the form of the government, shall be determined by representatives of the inhabitants of Cyrenaica, Tripolitania and the Fezzan meeting and consulting together in a National Assembly ;

4. That, for the purpose of assisting the people of Libya in the formulation of the constitution and the establishmnnt of an independent Government, there shall be a United Nations Commissioner in Libya appointed by the General Assembly and a Council to aid and advise him ;

5. That the United Nations Commissioner, in consultation with the Council, shall submit to the Secretary-General an annual report and such other special reports as he may consider necessary. To these reports shall be added any memorandum or document that the United Nations Commissioner or a member of the Council may wish to bring to the attention of the United Nations ;

6. That the Council shall consist of ten members, namely :

(*a*) One representative nominated by the Government of each of the following countries : Egypt, France, Italy, Pakistan, the United Kingdom of Great Britain and Northern Ireland and the United States of America ;

(*b*) One representative of the people of each of the three regions of Libya and one representative of the minorities in Libya ;

7. That the United Nations Commissioner shall appoint the representatives mentioned in paragrab 6 (*b*), after consultation with the Administering Powers, the representatives of the Governments mentioned in paragraph 6 (*a*), leading personalities and representatives of political parties and organizations in the territories concerned ;

8. That, in the discharge of his functions, the United Nations Commissioner shall consult and be guided by the advice of the members of his Council, it being understood that he may call upon different members to advise him in respect of different regions or different subjects ;

9. That the United Nations Commissioner may offer suggestions to the General Assembly, to the Economic and Social Council and to the Secretary-General as to the measures that the United Nations might adopt during the transitional period regarding the aconomic and social problems of Libya ;

10. That the Administering Powers in co-operation with the United Nations Commissioner ;

(*a*) Initiate immediately all necessary steps for the transfer of power to a duly constituted independent Government ;

(*b*) Administer the territories for the purpose of assisting in the establishment of Libyan unity and independence, cooperate in the formation of governmental institutions and coordinate their activities to this end.

(*c*) Make an annual report to the General Assembly on the steps taken to implement these recommendations ;

11. That upon its establishment as an independent State, Libya shall be admitted to the United Nations in accordance with Article 4 of the Charter.

THE CONSTITUTION OF LIBYA

OCTOBER 7, 1951

The original text, incorporating the modifications adopted by constitutional amendments of December 1962, and accompanied by the text of the law promulgating the amendments of April 25, 1963.

(By amendment 1963, the words "Federal" and "United" wherever contained in the Constitution are deleted.)

PREAMBLE

In the name of God the Beneficent, the Merciful.

We, the representatives of the people of Libya from Cyrenaica, Tripolitania and the Fezzan, meeting by the will of God in the cities of Tripoli and Benghazi in a National Constituent Assembly.

Having agreed and determined to form a union between us under the Crown of King Mohammed Idriss el Mahdi el Senussi to whom the nation has offered the Crown and who was declared constitutional King of Libya by this the National Constituent Assembly.

And having decided and determined to establish a democratic independent sovereign State which will guarantee the national unity, safeguard domestic tranquillity, provide the means for common defence, secure the establishment of justice, guarantee the principles of liberty, equality, and fraternity and promote economic and social progress and the general welfare.

And trusting in God, Master of the Universe, do hereby prepare and resolve this Constitution for the United Kingdom of Libya.

CHAPTER I

The Form of the State and the System of Government

1. Libya is a free independent sovereign State. Neither its sovereignty nor any part of its territories may be relinquished.

2. Libya is a State having a hereditary monarchy, its form is federal and its system of government is representative. Its name is "The United Kingdom of Libya". *(Amended 1963. See infra*, p. 45*)*

3. The United Kingdom of Libya consists of the Provinces of Cyrenaica, Tripolitania and the Fezzan. *(Amended 1963. See infra*, p. 45*)*

4. The boundaries of the United Kingdom of Libya are:

On the north, the Mediterranean Sea;

On the east, the boundaries of the Kingdom of Egypt and of the Anglo-Egyptian Sudan;

On the south, the Anglo-Egyptian Sudan, French Equatorial Africa, French West Africa and the Algerian Desert;

On the west, the boundaries of Tunisia and Algeria. *(Amended 1963. See infra*, p. 45*)*

5. Islam is the religion of the State.

6. The emblem of the State and its national anthem shall be prescribed by a federal law.

7. The national flag shall have the following dimensions: Its length shall be twice its breadth, it shall be divided into three parallel coloured stripes, the uppermost being red, the centre black and the lowest green, the black stripe shall be equal in area to the two other stripes together and shall bear in its centre a white crescent, between the two extremities of which there shall be a five-pointed white star.

CHAPTER II

Rights of the People

8. Every person who resides in Libya and has no other nationality, or is not the subject of any other State, shall be deemed to be a Libyan if he fulfils one of the following conditions :

(1) that he was born in Libya ;

(2) that either of his parents was born in Libya ;

(3) that he has had his normal residence in Libya for a period of not less than ten years.

9. Subject to the provisions of article 8 of this Constitution, the conditions necessary for acquiring Libyan nationality shall be determined by a federal law. Such law shall grant facilities to persons of Libyan origin residing abroad and to their children and to citizens of Arab countries and to foreigners who are residing in Libya, and who at the coming into force of this Constitution have had their normal residence in Libya for a period of not less than ten years. Persons of the latter category may opt for Libyan nationality in accordance with the conditions prescribed by the law, provided they apply for it within three years as from the 1st of January 1952.

10. No one may have Libyan nationality and any other nationality at the same time.

11. Libyans shall be equal before the law. They shall enjoy equal civil and political rights, shall have the same opportunities and be subject to the same public duties and obligations, without distinction of religion, belief, race, language, wealth, kinship or political or social opinion.

12. Personal liberty shall be guaranteed and everyone shall be entitled to equal protection of the law.

13. No forced labour shall be imposed upon anyone save in accordance with law in cases of emergency, catastrophe or circumstances which may endanger the safety of the whole or part of the population.

14. Everyone shall have the right of recourse to the Courts, in accordance with the provisions of the law.

15. Everyone charged with an offence shall be presumed to be innocent until proved guilty according to law in a trial at which he has the guarantees necessary for his defence. The trial shall be public save in exceptional cases prescribed by law.

16. No one may be arrested, detained, imprisoned or searched except in the cases prescribed by law. No one shall under any circumstances be tortured by anyone or subjected to punishment degrading to him.

17. No offence may be established or penalty inflicted except by law. Only offences committed after the promulgation of a law shall be subjected to the penalties specified therein for those offences; the penalty inflicted shall not be heavier than the penalty that was applicable at the time the offence was committed.

18. No Libyan may be deported from Libya under any circumstances nor may he be forbidden to reside in any locality or compelled to reside in any specific place or prohibited from moving in Libya except as prescribed by law.

19. Dwelling houses are inviolable; they shall not be entered or searched except in cases and according to the manner prescribed by law.

20. The secrecy of letters, telegrams, telephonic communications and all correspondence in whatever form and by whatever means shall be guaranteed; they shall not be censored or delayed except in cases prescribed by law.

21. Freedom of conscience shall be absolute. The State shall respect all religions and faiths and shall ensure to Libyans and foreigners residing in its territory freedom of conscience and the right to practice religion so long as it is not a breach of public order and is not contrary to morality.

22. Freedom of thought shall be guaranteed. Everyone shall have the right to express his opinion and to publish it by all means and methods. But this freedom may not be abused in any way which is contrary to public order or morality.

23. Freedom of the Press and of printing shall be guaranteed within the limits of the law.

24. Everyone shall be free to use any language in his private transactions or religious or cultural matters or in the Press or any other publications or in public meetings.

25. The right of peaceful meetings is guaranteed within the limits of the law.

26. The right of peaceful association shall be guaranteed. The exercise of that right shall be regulated by law but the establishment of secret associations and those which have as their purpose the realization of political objectives by means of organizations of a military nature shall be prohibited. *(Amended 1963. See infra,* p. 45*)*

27. Individuals shall have the right to address public authorities by means of letters signed by them in connection with matters which concern them but only organized bodies or juristic persons may address the authorities on behalf of a number of persons.

28. Every Libyan shall have the right to education. The State shall ensure the diffusion of education by means of the establishment of public schools, and of private schools which it may permit to be established under its supervision, for Libyans and foreigners.

29. Teaching shall be unrestricted so long as it does not constitute a breach of public order and is not contrary to morality. Public education shall be regulated by law.

30. Elementary education shall be compulsory for Libyan children of both sexes; elementary and primary education in the public schools shall be free.

31. Property shall be inviolable. No owner may be prevented from disposing of his property except within the limits of the law. No property of any person shall be expropriated except in the public interest and in the cases and in the manner determined by law and provided such person is awarded fair compensation.

32. The penalty of general confiscation of property shall be prohibited.

33. The family is the basis of society and shall be entitled to protection by the State. The State shall also protect and encourage marriage.

34. Work is one of the basic elements of economic life. It shall be protected by the State and shall be the right of all Libyans. Every individual who works shall be entitled to fair remuneration.

35. The State shall endeavour to provide as far as possible for every Libyan and his family an appropriate standard of living.

CHAPTER III

PART I

Powers of the Federal Government

Title Revoked 1963

36. *(As amended 1962. Revoked 1963).* The Federal Government shall exercise powers in connection with the matters shown in the following list:

(1) Diplomatic, consular and commercial representation.
(2) Affairs of the United Nations and its specialized agencies.
(3) Participation in international conferences and bodies and the implementation of the decisions adopted by them.
(4) Matters relating to war and peace.
(5) The conclusion and implementation of treaties and agreements with other States.
(6) The regulation of trade with foreign States.
(7) Foreign loans.
(8) Extradition.
(9) The issue of Libyan passports and visas.
(10) Immigration into Libya and emigration from Libya.
(11) Admission into and residence of foreigners in Libya and their expulsion.
(12) Matters relating to nationality.
(13) All other matters relating to foreign affairs.
(14) Provision for the land, sea and air forces, their training and maintenance and the employment thereof.

(15) Defence industries.
(16) Libyan military, naval and air force arsenals.
(17) The limitation of powers in cantonment areas, the appointment of personnel for these areas and determining their powers and the regulation of residence therein. The boundaries thereof shall be delimited after consultation with the Provinces.
(18) Arms of all kinds for national defence, including firearms, ammunition and explosives.
(19) Martial law.
(20) Atomic energy and materials essential to its production.
(21) All other matters relating to national defence.
(22) Air Lines and agreements relating thereto.
(23) Meteorology.
(24) Posts and telegraphs, telephones, wireless, federal broadcasting and other forms of federal communication.
(25) Federal roads and other roads which the Federal Government, after consultation with the Provinces, decides do not belong to a particular Province.
(26) The construction and control of federal railways, after agreement with the Provinces which they cross.
(27) Customs and fees on production.
(28) Taxation necessary to meet the expenditure of the Federal Government, after consultation with the Provinces.
(29) Banks.
(30) Currency, the minting of coins and the issue of notes.
(31) Federal finances and public debt.
(32) Exchange and stock exchanges.
(33) Inquiries and statistics relating to the Federal Government.
(35) In consultation with the Provinces, the promotion of agricultural and industrial production and commercial activities and the ensuring to the country of essential foodstuffs.
(36) Properties of the Federal Government, the acquisition, management and disposal thereof.
(37) The maintenance of order and public security in the State.
(38) Public education of all kinds at all levels and the determination of educational degrees.
(39) Companies.
(40) Organization of imports and exports and price control.
(41) Income tax.
(42) Monopolies and concessions.
(43) Sub-oil wealth and prospecting and mining.
(44) Weights and measures.
(45) All forms of insurance.
(46) Census.

(47) Shipping and navigation.
(48) Major ports which the Federal Government considers to be of importance with regard to international navigation.
(49) Aircraft and air navigation, the construction of airports, the regulation of air traffic and the administration of air traffic and the administration of airports.
(50) Lighthouses, including lightships, beacons and other provisions for the safety of sea and air navigation.
(51) The establishment of the general judicial organization subject to the provisions of Chapter 8 of this Constitution.
(52) Civil, commercial and criminal law, civil and criminal procedure, the legal profession.
(53) Literary, artistic and industrial copyright, inventions, patents, trade-marks and merchandise marks.
(54) Newspapers, books, printing presses and federal broadcasting.
(55) Public meetings and associations.
(56) Expropriation.
(57) All matters relating to the national flag and the national anthem and official holidays.
(58) Conditions for practicing scientific and technical professions.
(59) Labour and social security.
(60) Tourism, antiquities and archaeological sites and museums, libraries, and other institutions declared by a federal law to be of national importance.
(61 Public health and the co-ordination of matters relating thereto.
(62) Quarantine and quarantine stations.
(63) Conditions for licences to practice the medical profession and other professions connected with health.
(64) All matters assigned by this Constitution to the Federal Government.

(Original Text 1951). The Federal Government shall exercise legislative and executive powers in connection with the matters shown in the following list :—

(1) Diplomatic, consular and commercial representation.
(2) Affairs of the United Nations and its specialized.
(3) Participation in international conferences and bodies and the implementation of the decisions adopted by them.
(4) Matters relating to war and peace.
(5) The conclusion and implementation of treaties and agreements with other States.
(6) The regulations of trade with foreign States.
(7) Foreign loans.
(8) Extradition.

(9) The issue of Libyan passports and visas.
(10) Immigration into Libya and emigration from Libya.
(11) Admission into and residence of foreigners in Libya and their expulsion.
(12) Matters relating to nationality.
(13) All other matters relating to foreign affairs.
(14) Provisions for the land, sea and air forces, their training and maintenance and the employment thereof.
(15) Defence industries.
(16) Libyan military, naval and air force arsenals.
(17) The limitation of powers in cantonment areas, the appointment of personnel for these areas and determining their powers and the regulation of residence therein. The boundaries thereof shall be delimited after consultation with the Provinces.
(18) Arms of all kinds for national defence, including firearms, ammunition and explosives.
(19) Martial law.
(20) Atomic energy and materials essential to its production.
(21) All other matters relating to national defence.
(22) Air lines and agreements relating thereto.
(23) Meteorology.
(24) Posts and telegraphs, telephones, wireless, federal broadcasting and other forms of federal communication.
(25) Federal roads and other roads which the Federal Government, after consultation with the Provinces, dceides to not belong to a particular Province.
(26) The construction and control of federal railways, after agreement with the Provinces which they cross.
(27) Customs.
(28) Taxation necessary to meet the expenditure to the Federal Government, after consultation with the Provinces.
(29) Federal Bank.
(30) Currency, the minting of coins and the issue of notes.
(31) Federal finances and public debt.
(32) Exchange and stock exchanges.
(33) Inquiries and statistics relating to the Federal Government.
(34) Matters relating to the officers of the Federal Government.
(35) In consultation with the Provinces, the promotion of agricultural and industrial production and commercial activities and the ensuring to the country of essential foodstuffs.
(36) Properties of the Federal Government, the acquisition, management and disposal thereof.
(37) Cooperation between the Federal Government and the

Provinces in the work of the criminal police and the pursuit of international criminals.

(38) Education in universities and other institutions of higher education and the determination of educational degrees.

(39) All matters assigned by this Constitution of the Federal Government.

37. The Federal Government may, with the agreement of any Province, delegate to it or to its officers the executive power concerning any matter which is within its competence under this Constitution, provided the Federal Government will bear the expense of the execution. *(Revoked 1963. See infra, p. 43)*

PART II.

Joint Powers

(Revoked 1963)

38. *(Original Text 1951. Cancelled 1962).* In order to ensure a coordinated and unified policy between the Provinces, the legislative power relating to the following matters shall be within the competence of the Federal Government, while the executive power in connection with the implementation of that legislation shall be within the competence of the Provinces acting under the supervision of the Federal Government.

(1) Companies.
(2) Banks.
(3) Organization of imports and exports.
(4) Income tax.
(5) Monopolies and concessions.
(6) Sub-soil wealth and prospecting and mining.
(7) Weights and measures.
(8) All forms of insurance.
(9) Census.
(10) Shipping and navigation.
(11) Major ports which the Federal Government considers to be of importance with regard to international navigation.
(12) Aircraft and air navigation, the construction of airports, and regulation of air traffic and the administration of airports.
(13) Lighthouse, including lightships, beacons and other provisions for the safety of sea and air navigation.

(14) The establishment of the general judicial organization subject to the provisions of Chapter VIII of this Constitution.
(15) Civil, commercial and criminal law, civil and criminal procedure, the legal profession.
(16) Literacy, artistic and industrial copyright, inventions, patents, trademarks and merchandise marks.
(17) Newspapers, books, printing presses and broadcasting.
(18) Public meetings and associations.
(19) Expropriation.
(20) All matters relating to the national flag and the national anthem and official holidays.
(21) Conditions for practising scientific and technical professions.
(22) Labour and social security.
(23) The general system of education.
(24) Antiquities and archaeological sites and museums, libraries, and other institutions declared by a federal law to be of national importance.
(25) Public health and the co-ordination of matters relating thereto.
(26) Quarantine and quarantine stations.
(27) Conditions for licences to practice the medical profession and other professions connected with health.

39. The Provinces shall exercise all powers connected with the matters which have not been assigned by this Constitution to the Federal Government. *(Revoked 1963. See infra,* p. 43*)*

CHAPTER IV

General Federal Powers

40. Sovereignty is vested in the nation and the nation is the source of powers. *(Amended 1963. See infra,* p. 45*)*

41. Legislative power shall be exercised by the King in conjunction with Parliament. The King promulgates the laws when they have been approved by Parliament in accordance with the procedure prescribed by this Constitution.

42. Executive power shall be exercised by the King within the limits of this Constitution.

43. Judicial power shall be exercised by the Supreme Court and other courts, which shall give judgements within the limits of this Constitution, in accordance with the law and in the name of the King.

CHAPTER V

The King

44. The sovereignty of the United Kingdom of Libya is vested in the nation. By the will of God, the people entrust it to King Mohamed Idris el Mahdi el Senussi and after him to his male heirs, the oldest after the oldest, degree after degree. *(Amended 1963. See infra,* p. 45*)*

45. The Throne of the Kingdom is hereditary. The order of succession to the Throne shall be determined by Royal Decree promulgated by King Idriss I within a year of the date of the promulgation of this Constitution. No one may accede to the Throne unless he is of sound mind, a Libyan and a Moslem born of Moslem parents legally wedded. The Royal Decree which shall regulate the succession to the Throne shall have the same force as an article of this Constitution. *(Amended 1963. See infra,* p. 46*)*

46. In the event of the King's death and the Throne remaining vacant owing to the lack of a successor to the king or to no successor having been appointed, the Senate and the House of Representatives shall at once hold a joing meeting without convocation to appoint a successor within ten days; three quarters at least of the number of members of the two Chambers shall be present and the voting shall take place openly by a majority of two-thirds of the members present. If the choice cannot take place within the time specified, the two Chambers shall jointly proceed to make the choice on the eleventh day, in presence of an absolute majority of the members of each of the Chambers and by a proportionate majority. If the House of Representatives has been dissolved the old House shall immediately meet until the King has been chosen.

47. Before assuming his constitutional powers, the King shall take the following oath before a joint session of the Senate and the House of Representatives: "I swear by Almighty God to observe the Constitution and the laws of the country and to devote all my efforts to the maintenance of the independence of Libya and to defending the safety of its territory."

48. Whenever the King wishes to travel outside Libya or when circumstances prevent or delay him temporarily from

exercising his constitutional powers, he may appoint one or more Deputies to perform such duties and to exercise such right and powers as the King may delegate to such Deputy or Deputies.

49. The King shall attain his majority upon the completion of his eighteenth lunar year.

50. If the King is a minor, or if any circumstances prevent or delay him from exercising his constitutional powers and he himself is unable to appoint a Deputy or Deputies, the Council of Ministers shall with the consent of Parliament appoint a Regent or a Council of Regency to perform the duties of the King and to exercise his rights and powers until such time as he becomes of age or is capable of exercising his powers. If Parliament is not in session it shall be convened. If the House of Representatives has been dissolved the old House shall immediately meet until such time as the Regent or Council of Regency has been appointed.

51. No person may be appointed a Deputy to the Throne or a Regent or a member of the Council of Regency unless he is a Libyan and a Moslem and has completed his fortieth year, (Gregorian); however, a male of the Royal Family who has completed his twenty-first year (Gregorian) may be appointed.

52. During the period between the death of the King and the taking of the constitutional oath by his successor to the Throne, by the Regent or by the members of the Council of Regency, the Council of Ministers shall, on its own responsibility, exercise the constitutional powers of the King in the name of the Libyan nation.

53. The Regent or any member of the Council of Regency shall not assume office unless he has taken the following oath before a joint meeting of the Senate and the House of Representatives: "I swear by Almighty God to observe the Constitution and the laws of the country, to devote all my efforts to the maintenance of its territory and to be loyal to the King."

A Deputy to the Throne shall take his oath before the King or some person designated by the King.

54. A Minister or any members of a legislative body may not be Regent or a member of a Council of Regency. If a

Deputy to the Throne is a member of any legislative body he shall not take part in the activities of that body during the time he is acting as Deputy to the Throne.

55. If a Regent or a member of the Council of Regency, appointed in accordance with article 50, dies or is prevented by any circumstances from performing his duties as Regent or as a member of the Council of Regency, the Council of Ministers may with the consent of Parliament appoint another person to replace him, in accordance with the provisions of articles 51, 53 and 54.

If Parliament is not in session it shall be convened. If the House of Representatives has been dissolved the old House shall immediately meet until such time as a Regent or a member of the Council of Regency has been appointed.

56. The Civil List of the King and of the Royal Family shall be fixed by federal law ; it may not be reduced during his reign but it may be increased by resolution of Parliament. The law shall limit the salaries of Deputies to the Throne and of Regents which shall be paid from the Civil List of the King.

57. The judicial procedure to be followed in cases brought by the Royal Estate or against it shall be regulated by a federal law.

58. The King is the supreme head of the State.

59. The King shall be inviolable. He shall be exempt from all responsibility.

60. The King exercises his power through his Ministers and responsibility rests with them.

61. The King shall not assume a throne outside Libya except after the consent of Parliament.

62. The King sanctions and promulgates the laws.

63. The King shall make the necessary regulations for carrying out the laws without modifying or suspending the laws or dispensing with their execution.

64. If, when Parliament is not in session, exceptional circumstances arise which necessitate urgent measures, the King

may issue decrees in respect thereof which shall have the force of law provided that they are not contrary to the provisions of this Constitution. Such decrees must be submitted to Parliament at its first meeting; if they are not submitted to Parliament or if they are not approved by either of the Chambers they shall cease to have the force of law.

65. The King shall open the sessions of Parliament and close them, and shall dissolve the House of Representatives in accordance with the provisions of this Constitution, and he may, when necessary, convene a joint meeting of the two Chambers to discuss any important question.

66. The King may, if he deems necessary, convene Parliament to meet in an extraordinary session; he shall also convene it upon the presentation of a petition signed by an absolute majority of the members of the two Chambers. The King shall pronounce the closure of an extraordinary session.

67. The King may adjourn the session of Parliament but the adjournement may not exceed a period of thirty days nor may it be repeated during the same session without the consent of both Chambers.

68. The King is the supreme commander of all the Libyan armed forces. *(Amended 1963. See infra,* p. 46*)*

69. The King shall declare war and conclude peace and enter into treaties which he ratifies after the approval of Parliament.

70. The King shall proclaim martial law and a state of emergency provided that he shall present the proclamation of martial law to Parliament in order to decide whether it shall continue or be repealed. If that proclamation is made when Parliament is not in session, Parliament must be urgently convened.

71. The King shall create and confer titles, ranks, decorations and all other signs of honour. *(Amended 1963. See infra,* p. 46*)*

72. The King shall appoint the Prime Minister, he may remove him from office or accept his resignation; he shall appoint the Ministers, remove them from office, or accept their resignation at the proposal of the Prime Minister.

73. The King shall appoint diplomatic representatives and remove them from office at the proposal of the Minister of Foreign Affairs. He shall accept the credentials of the heads of foreign diplomatic missions accredited to him.

74. The King shall establish the public services and appoint senior officials and remove them in accordance with the provisions of the law.

75. Currency shall be issued in the name of the King, according to law.

76. No death sentence imposed by any Libyan court shall be executed except with the consent of the King.

77. The King shall have the right to grant pardon and to commute a sentence.

CHAPTER VI

The Ministers

78. The Council of Ministers shall consist of the Prime Minister and of the Ministers whom the King deems fit to appoint at the proposal of the Prime Minister.

79. Before assuming office the Prime Minister and Ministers shall take an oath before the King. *(Amended 1963. See infra, p. 46)*

80. The King may appoint Ministers without port-folio in case of necessity.

81. No non-Libyan may be a Minister.

82. No member of the Royal Family may be a Minister.

83. A Minister may at the same time be a member of Parliament.

84. The Council of Ministers shall be responsible for the direction of all the internal and external affairs of the State, in accordance with the powers given to the Federal Government

by this Constitution and in accordance with the provisions of this Constitution. *(Amended, 1963. See infra,* p. 46*)*

85. For the signatures of the King concerning the affairs of State to be effective, they must have the counter-signature of the Prime Minister and of the competent Ministers, provided that decrees appointing the Prime Minister or relieving him of office shall be signed by the King alone and decrees appointing Ministers or relieving them of office shall be signed by the King and countersigned by the Prime Minister. *(Amended, 1963. See infra,* p. 46*)*

86. The Ministers are collectively responsible to the House of Representatives for the general policy of the State and each of them individually is responsible for the activities of his Ministry.

87. If the House of Representatives by a majority of all its members passes a vote of no confidence in the Council of Ministers, the Council of Ministers must resign. If the decision concerns one of the Ministers, he must resign.

The House of Representatives shall not consider the request for a vote of no confidence, whether such request be direct or implied, unless it has been presented by fifteen or more of the Deputies. Such request may not be discussed except after eight days from the date of its presentation and shall not be voted upon except after two days from the completion of the discussion thereon.

88. Ministers shall have the right to attend the meetings of both Chambers and must be heard whenever they so request; they may not take part in the voting unless they are members. They may have the assistance of any officer they choose of their Ministry or may appoint any such officer as a deputy to represent them. Each Chamber may when necessary request any Minister to attend its meeting.

89. In the event of the dismissal or resignation of the Prime Minister all the Ministers are considered thereby to have been dismissed or to have resigned.

90. The Ministers may not while holding office assume any other public office, exercise any other profession or purchase or

rent any property belonging to the State, and they may not directly or indirectly take part in the undertakings concluded and tenders invited by the public administration or the institutions falling under the administration or control of the State. They may not be members of the Board of Directors of any company nor may they take an active part in any commercial or financial enterprise. *(Amended, 1963. See infra,* p. 47*)*

91. The salaries of the Prime Minister and the other Ministers shall be determined by federal law.

92. A federal law shall prescribe the civil and criminal responsibilities of the Ministers and the manner in which they may be charged and tried in respect of offences committed by them in the exercise of their duties.

CHAPTER VII

Parliament

93. Parliament shall consist of two Chambers, the Senate and the House of Representatives.

PART I.

THE SENATE

94. The Senate shall consist of twenty-four members. Each of the three Provinces of the Kingdom of Libya shall have eight members. *(Amended, 1963. See infra,* p. 47*)*

95. The King appoints one half of the members. The other members shall be elected by the Legislative Councils of the Provinces. *(Revoked Law No. 1, 1963.* v. also p. 43*)*

96. A Senator must be a Libyan and have completed the fortieth year of his age (Gregorian) and possess such qualifications as are provided in the federal electoral law. *(Amended, 1963. See infra,* p. 47*)*

Members of the Royal Family may be appointed to the Senate but may not be elected.

97. The President of the Senate shall be appointed by the King. The Senate shall elect two Vice-Presidents. The result of the election shall be submitted to the King for approval. The appointment of the President and the election of the two Vice-Presidents shall be for a period of two years and the President may be reappointed and the two Vice-Presidents may be re-elected.

98. Membership of the Senate shall be for eight years. Half the appointed Senators and half the elected Senators shall be replaced every four years. Retiring Senators may be re-appointed or re-elected. *(Amended, 1963. See infra,* p. 47*)*

99. The Senate shall meet at the same time as the House of Representatives ; its sessions shall close at the same time as the House of Representatives.

PART II

THE HOUSE OF REPRESENTATIVES

100. The House of Representatives shall consist of members elected in the three Provinces in accordance with the provisions of a federal electoral law. *(Amended, 1963. See infra,* p. 47*)*

101. The number of Deputies shall be determined on the basis of one Deputy for every twenty thousand inhabitants or fraction of that number exceeding half, provided that the number of Deputies in any of the three Provinces shall not be less than five. *(Amended, 1963. See infra,* p. 47*)*

102. A voter must be :

(1) a Libyan and
(2) shall have completed his twenty-first year (Gregorian), in addition to the conditions prescribed by the federal electoral law. *(Amended, 1963. See infra,* p. 48*)*

103. A deputy must :

(1) have completed his thirtieth year (Gregorian) and
(2) be inscribed on one of the electoral rolls of the Province in which he resides

(3) not be a member of the Royal family, in addition to the conditions prescribed by the federal electoral law. *(Amended, 1963. See infra, p. 48)*

104. The term of office of the House of Representatives shall be four years unless it is dissolved earlier.

105. At the opening of every session, the House of Representatives shall elect a President and two Vice-Presidents, who shall be eligible for re-election.

106. If the House of Representatives is dissolved on account of any matter, the succeeding House of Representatives may not be dissolved on account of the same matter.

107. The order whereby the House of Representatives is dissolved shall call upon the electors to carry out new elections in the three Provinces within a period not exceeding three months. It must also provide for the new Chamber to be convened within twenty days of the completion of the elections. *(Amended, 1963. See infra, p. 48)*

PART III

PROVISIONS COMMON TO THE TWO CHAMBERS

108. Each member of Parliament represents the whole people ; his electors or the authority that appoints him may not make his mandate subject to any conditions or restrictions.

109. No one may be both a Senator and Deputy at the same time. No member of Parliament may at the same time be a member of a provincial Legislative Council or the holder of any public office. Other cases of incompatibility shall be determined by the federal electoral law. *(Amended, 1963. See infra, p. 48)*

110. Before assuming his duties each Senator and each Deputy shall take publicly in the place of meeting of his Chamber the following oath :— "I swear by Almighty God to be loyal to the country and to the King, to observe the Constitution and the laws of the country and to carry out my duties honestly and truthfully."

111. Each Chamber decides upon the validity of the election of its members in accordance with its rules of procedure provided that, in order to decide that the election of a member is invalid, a majority of two-thirds of the members of the Chamber shall be required. This power may be delegated to another authority by virtue of a federal law.

112. The King shall call Parliament annually to hold its regular meeting in the first week of November. Failing such convocation Parliament shall meet on the tenth day of the same month. Unless the Chamber of Deputies is dissolved, the regular session shall last for at least five months and the King shall pronounce the closure of the session.

113. The period of sessions shall be common to both Chambers. If both Chambers meet, or either of them meets, at a time other than the legal time the meeting shall be unlawful and any resolutions taken shall be void.

114. The meeting of the two Chambers shall be public but each Chamber shall, at the request of the Government or of ten of its members, go into secret session in order to decide whether the discussion on the question before it is to be held in public or in secret.

115. During extraordinary sessions Parliament shall not discuss, except with the consent of the Government, questions other than those for which it has been convened.

116. The meetings of either of the two Chambers shall not be valid unless the majority of the members are present at the opening of the meeting. Neither of the two Chambers may take a decision unless the majority of its members are present at the time of the decision.

117. Except in case where a special majority is required, decisions in each of the Chambers shall be adopted by a majority of the members present. If the vote is equally divided, the proposal in question shall be considered to have been rejected.

118. Voting on questions under discussion in each Chamber shall take place in the manner prescribed in its rule of procedure.

119. Neither Chamber may discuss a bill before it has been considered by the appropriate committees in conformity with its rules of procedure.

120. Every bill adopted by one of the two Chambers shall be transmitted by the President of that Chamber to the President of the other Chamber.

121. A bill which has been rejected by either Chamber may not be reintroduced at the same session.

122. Every member of Parliament has the right, in conditions which shall be determined in the rules of procedure of each Chamber, to address questions and interpellations to Ministers. Discussion on an interpellation shall not take place until at least eight days after it has been presented, except in cases of emergency and with the consent of the person to whom the interpellation is addressed.

123. Each Chamber shall have the right to investigate, in accordance with its rules of procedure, specific questions within its competence.

124. Members of Parliament shall have immunity with regard to opinions they have expressed in either Chamber or in the committees thereof, subject to the provisions of the respective rules of procedure.

125. Except in cases of flagrante delicto, no member of either Chamber may be prosecuted or arrested for criminal offences while Parliament is in session, without the authorization of the Chamber of which he is a member. *(Amended, 1963. See infra, p. 48)*

126. Members of Parliament other than those who exercise governmental offices compatible with parliamentary membership may not be granted any title or decoration, with the exception of military ranks and decorations, during their term of office. *(Amended, 1963. See infra, p. 48)*

127. The conditions under which a member of Parliament forfeits his membership shall be determined by the federal electoral law and the decisions of such forfeiture shall be taken

by a majority of all the members of the Chamber to which such member belongs.

128. If a seat becomes vacant in either of the Chambers, it shall be filled within three months by election or appointment in conformity with the provisions of this Constitution ; the period of three months shall commence on the date on which the Chamber informs the Government of the vacancy. The term of office of a new Senator shall be limited to the term of office of his predecessor. The term of office of a new member of the House of Representatives shall expire upon the termination of the period of office of the Chamber.

129. Elections for a new House of Representatives shall take place within the three months preceding the expiration of the period of office of the old House of Representatives. If it is not possible to carry out elections within the said period the term of office of the old House of Representatives shall extend until elections are held, notwithstanding the provisions of article 104.

130. The replacement of half the members of the Senate shall take place by means of election or appointment within the three months preceding the expiration of the terms of office of the retiring Senators. If it is impossible to effect the replacement within that period, the term of office of the Senators whose period of office has expired shall be prolonged until the election or appointment of the new Senators, notwithstanding the provisions of article 98. *(Amended, 1963. See infra, p. 49)*

131. The remuneration of members of Parliament shall be fixed by federal law, provided that no increase in such remuneration shall take effect until after the expiration of the term of office of the House of Representatives which decided it.

132. Each Chamber shall lay down its own rules of procedure and shall specify therein the manner in which it will exercise its functions.

133. The President of each Chamber shall be responsible for maintaining order in his Chamber ; no armed force may enter either Chamber or be stationed near its doors except by request of the President.

134. No one may present a request to Parliament except in writing. Each Chamber may transmit the petitions addressed to it to the Ministers. The Ministers shall be bound to give the Chamber necessary explanations regarding such petitions whenever the Chamber so requires.

135. The King shall sanction the laws passed by Parliament and shall promulgate them within thirty days of the date of their communication to him.

136. Within the period prescribed for the promulgation of a law, the King may refer the law back to Parliament for reconsideration, in which case Parliament must reconsider the law. If the law is passed again by a two-thirds majority of the members composing each of the two Chambers, the King shall sanction and promulgate it within the thirty days following the communication to him of the last decision. If the majority is less than two-thirds the bill shall not be reconsidered during that session. If Parliament in another session passes such bill again by a majority of all the members composing each of the two Chambers the King shall sanction and promulgate it within the thirty days following the communication of the decision to him.

137. Laws which are promulgated by the King shall become effective in the United Kingdom of Libya after thirty days from the date of their publication in the official gazette. This period may be increased or decreased by a special provision in the law concerned. The laws must be published in the official gazette within fifteen days of their promulgation.

138. The right to initiate laws shall be vested in the King, the Senate and the House of Representatives, except when they concern the budget or the imposing of new taxes or the modification of taxes or exemption or part exemption from taxes or their abolition, when the right to initiate such laws shall be vested in the King and the House of Representatives.

139. The President of the Senate shall preside whenever the two Chambers meet together in Congress. In his absence the President of the House of Representatives shall preside.

140. The meetings of the Congress shall be valid only when the absolute majority of the members of each of the two Chambers composing the Congress are present.

CHAPTER VIII

The Judiciary

(Revoked and Replaced, 1963. v. Schedule 2, p. 50)

141. The general judicial organization of the State shall be determined by federal law in accordance with the provisions of this Constitution.

142. The judges shall be independent ; in the administration of justice, they shall be answerable only to the law.

FEDERAL SUPREME COURT

143. The Supreme Court shall consist of a President and of judges appointed by the King.

144. Before taking office the President and members of the Supreme Court shall take oath before the King.

145. Should the office of a judge fall vacant, the King, after consulting the President of the Court shall appoint another judge.

146. The President and juges of the Court shall retire when they have completed the sixty-fifth year of their age (Gregorian).

147. The President and judges of the Court may not be removed from office ; nevertheless, if it appears that for reasons of health, or because he has lost the confidence or respect which his office requires, one of them can no longer exercise his functions, the King, with the approval of the majority of the members of the Court, excluding the member concerned, shall relieve him of his office.

148. The basic salaries, allowances and provisions concerning leave of absence and pensions or providend fund of judges of the Supreme Court shall be determined by a federal law ; no modification which would be prejudicial to a judge shall apply to a judge after he has been appointed.

149. When the President of the Court is absent or otherwise unable to perform his duties the King may appoint a member of the Court to perform the duties of the President.

150. When a judge is absent or otherwise unable to perform his duties the King may, after consultation with the President, appoint some person to replace him during his absence ; the member thus appointed shall enjoy all privilege of the other judges of the Court while he is so acting.

(Arts 150-158 inclusive, repealed by law No. 1, 1963)

151. The Supreme Court exclusively shall be competent to hear disputes which may arise between the Federal Government and one or more Provinces or between two or more Provinces. *(Repealed 1963)*

152. The King may refer important constitutional and legislative questions to the Supreme Court for an opinion ; the Court shall examine such questions and inform the King of its opinion, taking into account the provisions of this Constitution. *(Repealed 1963)*

153. An appeal may be lodged with the Supreme Court, in accordance with the provisions of the federal law against any judgement by a provincial court in civil or criminal proceedings if such judgement included a decision in a dispute concerning this Constitution or the interpretation thereof. *(Repealed 1963)*

154. Subject to the provisions of article 153, the cases in which an appeal against the judgement of a provincial court or an appeal for cassation may be lodged with the Supreme Court shall be determined by a federal law. *(Repealed 1963)*

155. The legal principles embodied in the decisions of the Supreme Court shall be binding on all courts within the United Kingdom of Libya. *(Repealed 1963)*

156. All civil and judicial authorities in the United Kingdom of Libya shall give the Supreme Court any assistance it may require. *(Repealed 1963)*

157. Other functions may be conferred on the Supreme Court by Federal law, so long as they are not contrary to the provisions of this Constitution. *(Repealed 1963)*

158. The Supreme Court, with the approval of the King, shall determine the rules regulating the practice and procedure in the Court and fixing the fees to be charged. *(Repealed 1963)*

CHAPTER IX

Federal Finance

THE FINANCIAL SYSTEM (New title, 1963)

159. The general budget shall be submitted to Parliament for study and approval at least two months before the beginning of the financial year. The budget shall be approved topic by topic. The beginning of the financial year shall be determined by a federal law.

160. The budget shall be discussed and approved in the first instance by the House of Representatives.

161. The parliamentary session may not be terminated before the budget has been approved.

162. In all cases where the budget has not been approved before the beginning of the financial year, provisional monthly credits shall be opened by Royal Decree on the basis of one twelfth of the credits for the preceding year, and revenue shall be collected and sums expended in accordance with the laws in force at the end of the preceding financial year.

163. Any expenditure for which provision has not been made in the budget or which exceeds the budget estimates must be authorized by Parliament and any transfer of funds from one head of the budget to another must also be so authorised.

164. Between sessions or during the period when the House of Representatives is dissolved, and in cases of urgent necessity, new expenditure for which provision has not been made in the budget may be approved or sums may be transferred from one head of the budget to another on condition that such action is taken by Royal Decree and submitted to Parliament within a period of not more than one month after the next meeting.

165. A draft exceptional budget may in cases of necessity be drawn up for more than one year to provide for revenue and expenditure of an exceptional nature ; such a budget shall not be put into force until it has been approved by Parliament.

166. The Audit Office shall audit the Federal Government accounts and shall report to Parliament on the result of the audit. The powers of the Audit.Office and its constitution and the rules for exercising its auditing powers shall be determined by federal law.

167. No tax may be imposed, modified or abolished except by law. No one may be exempt from the payment of taxes except in cases provided by law. No one may be asked to pay any amounts of fees except within the limits of the law.

168, No pension, compensation, gratuity or payment from provident fund may be approved for payment out of the Government Treasury except within the limits of the law.

169. No public loan or undertaking that is likely to be a charge on the Treasury for one or more of the following years may be contracted without the consent of Parliament.

170. The currency system shall be determined by federal law.

171. Any dispute between the Senate and the House of Representatives concerning the approval of a head of the budget shall be settled by a decision taken by an absolute majority of the two Chambers meeting in Congress.

172. *(As amended 1962).* The receipts from all taxes and fees relating to matters which are within the competence of the Federal Government under Article 36 of this Constitution shall be paid to the Federal Government. *(Amended, 1963. See infra,* p. 49*)*

(Original text, 1951). The receipts from all taxes and fees relating to matters which are within the legislative and executive competence of the Federal Government under Article 36 of this Constitution shall be paid to the Federal Government.

173. *(As amended, 1962. Revoked, 1963,* p. 43*).* Each Province shall have the revenue from taxes and fees accruing from matters within its competence in accordance with Article 39.

(Original text, 1951). Each Province shall have the revenue from taxes and fees accruing from matters within its competence in accordance with Article 39 of this Constitution, and also from matters within its executive competence in accordance with Article 38 of this Constitution.

174. The Federal Government must allocate to the Provinces from its receipts sufficient funds to enable them to discharge their obligations subject to the condition that their financial capacity is not less than it was before independence. The method and amount of such allocation shall be determined by federal law in a manner that will guarantee to the Provinces an increase in the amounts to be allocated to them by the Federal Government, such increases to be proportionate to the growth of the federal revenue and such as will guarantee to them a constant economic progress. *(Revoked, 1963. See infra,* p. 43*)*

175. In case of the imposition of federal taxes for which provision is made in Article 36, paragraph 28, the Provinces shall be consulted before the bill relating to such taxes is submitted to Parliament. *(Revoked, 1963. See infra,* p. 43*)*

CHAPTER X

(Revoked and Replaced, 1963. See Schedule 3, p. 51*)*

The Provinces

THE LOCAL ADMINISTRATION (New title, 1963)

176. The Provinces shall exercise all powers which have not been assigned to the Federal Government under the provisions of its Constitution.

177. Each Province shall formulate its own Organic law provided that its provisions are not contrary to the provisions of this Constitution. The formulation of such laws and their promulgation shall take place within a period not exceeding one year from the promulgation of this Constitution.

(Arts 177-185 inclusive, repealed by law No. 1, 1963)

178. The Province shall be bound to observe the provisions of this Constitution and to enforce the federal law in the manner prescribed in this Constitution. (1951)

179. *(As amended, 1962).* Each Province shall have a Governor who shall be called the "Wali" whom the King shall appoint and may relieve of office.

(Original text, 1951). Each Province shall have a Governor who shall be called the "wali".

180. Cancelled, 1962.

(Original text, 1951). The King shall appoint the Wali and may relieve him of office.

181. Cancelled, 1962.

(Original text, 1951). The Wali shall represent the King within the Province and shall supervise the implementation of this Constitution and of the federal laws therein.

182. *(As amended, 1962).* Each Province shall have an Administrative Council. The Wali shall preside over it and shall be responsible before the Legislative Council in the Province. *(Revoked, 1963. See* p. 44*)*

(Original text, 1951). Each Province shall have an Executive Council.

183. Each Province shall have a Legislative Council, three-quarters of the members of which at least shall be elected. *(Repealed 1963)*

184. *(As amended, 1962. Repealed 1963).* The functions of the Administrative and Legislative Councils shall be determined by the Organic Law in each Province.

(Original text, 1951). The functions of the Wali shall be determined by the Organic Law in each Province, subject to the provisions of Article 181, and the functions of the Executive and Legislative Councils shall also be so determined.

185. Cancelled, 1962.

(Original text, 1951). Judicial power shall be exercised by the local tribunals in the Provinces in accordance with the provisions of this Constitution.

CHAPTER XI

General Provisions

186. Arabic shall be the official language of the State.

187. Cases in which a foreign language may be used in official transactions shall be determined by a federal law.

188. The United Kingdom of Libya has two capitals, Tripoli and Benghazi.

189. The extradition of political refugees shall be prohibited. International treaties and the federal laws shall prescribe the grounds for the extradition of ordinary criminals.

190. Foreigners shall be deported only in accordance with the provisions of the federal law.

191. The legal status of foreigners shall be prescribed by federal law in accordance with the principles of international law.

192. The State shall guarantee respect for the systems of personal status of non-Moslems.

193. General amnesty shall not be granted except by federal law.

194. A federal law shall determine the manner in which the land, sea and air forces are established and regulated.

195. No provisions of this Constitution may be suspended under any circumstances except where such suspension is temporary in time of war or during the operation of martial law and is in accordance with law. In any event a parliamentary session may not be suspended when the conditions prescribed by this Constitution for the holding of such session exist.

196. The King or either of the two Chambers may propose the revisions of this Constitution either by the amendment or deletion of one or more of its provision or by the insertion of additional provisions.

197. No proposal may be made to review the provisions relating to the monarchal form of government, the order of succession to the Throne, the representative form of government or the principles of liberty and equality guaranteed by this Constitution.

198. For the purpose of reviewing this Constitution, each of the two Chambers shall, by an absolute majority of all its members, adopt a resolution stating the necessity for the review and prescribing the subject thereof. The two Chambers shall,

after discussing the matters subject to review, adopt their decisions in respect thereof. Discussion and voting in each of the two Chambers shall not take place unless two-thirds of its members are present. The resolution to be valid must be adopted by a majority of two-thirds of the members present in each of the two Chambers and must be sanctioned by the King. *(Amended, 1963. See* p. 49*)*

199. In the event of a review of the provisions concerning the federal form of government, such review must be approved, in addition to the provisions laid down in the preceding article, by all the Legislative Councils of the Provinces. Such approval shall be expressed by a resolution taken in this request by the Legislative Council of each Province before the review is presented to the King for his sanction. *(Revoked, 1963. See* p. 43*)*

200. Immigration into Libya shall be regulated by a federal law. No immigration shall be permitted into a Province without the approval of the Province having been secured. *(Amended, 1963. See* p. 49*)*

CHAPTER XII

Transitory and Provisional Provisions

(Revoked and Replaced, 1963. v. new articles 201, 202 and 204. Schedule 4, pp. 51-52*)*

201. This Constitution shall come into force upon the declaration of independence, which must take place by 1st January 1952 in accordance with the resolution of the United Nations General Assembly dated 21st November 1949. Nevertheless the provisions of Article 8 of this Constitution and of this chapter shall come into force on the promulgation of this Constitution. *(Revoked and Replaced, 1963.* See pp. 44 and 51*)*

202. Until the establishment of a government constituted in accordance with the provisions of article 203 of this Constitution, the Provisional Federal Government shall exercise all the powers concerning the matters transferred to it by the two Administering Powers and by the existing Provincial Govern-

ments, provided that the provisions laid down by it shall not be contrary to the fundamental principles established by this Constitution. *(Revoked and Replaced, 1963. See* p. 44)

203. Upon the declaration of independence the King shall appoint the duly constituted Government. *(Repealed Law No. 1, 1963)*

204. The Provisional Federal Government shall draw up the first electoral law for Parliament, provided it is not contrary to the provisions laid down in this Constitution. The law shall be submitted to the National Assembly for approval and promulgation. The said law must be promulgated with a period not exceeding thirty days from the date of the promulgation of this Constitution. *(Revoked and Replaced, 1963.* See pp. 44 and 52)

205. The first elections to the House of Representatives must take place within a period not exceeding three and a half months from the date upon which the electoral law is promulgated. *(Arts 205-213 inclusive repealed Law No. 1, 1963)*

206. In the first elections to the House of Representatives and until a census of the Libyan people has been made, the Province of Cyrenaica shall have fifteen Deputies, the Province of Tripolitania thirty-five Deputies and the Province of the Fezzan five Deputies. *(Repealed 1963)*

207. Notwithstanding the provisions of articles 95 and 98 of this Constitution, the King shall appoint all members of the first Senate. Its term of office shall be four years as from the date of the first session of Parliament. *(Repealed 1963)*

208. Articles 95 and 98 shall become operative as from the date of the expiration of the term of office of the first Senate. The members of the Senate who will retire at the end of the first four years in accordance with the provisions of articles 95 and 98 shall be selected by lot. *(Repealed 1963)*

209. Notwithstanding the provisions contained in Article 47 of this Constitution, the first King of the United Kingdom of Libya shall exercice his constitutional powers upon the declaration of independence, provided that he shall take the prescribed oath before Parliament at its first session in a joint meeting. *(Repealed 1963)*

210. Unless they are inconsistent with the principles of liberty and equality guaranteed by this Constitution, all laws, subsidiary legislation, orders and notices which may be in operation in any part of Libya upon the coming into force of this Constitution shall continue to be effective and in operation until repealed or amended or replaced by other legislation enacted in accordance with the provision of this Constitution. *(Repealed 1963)*

211. The first Parliament shall be convened within a period of not more than twenty days from the date on which the final results of the elections are announced. *(Repealed 1963)*

212. Article 36 (par. 27) and Article 174 of this Constitution shall not come into operation before 1st April, 1952. *(Repealed 1963)*

213. The National Assembly shall continue in existence until the declaration of independence. *(Repealed 1963)*

The Libyan National Assembly prepared and resolved this Constitution in its meeting held in the city of Benghazi on Sunday, 6th Muharram, Hagera 1371, corresponding to 7th October 1951, and delegated its President and the two Vice-Presidents to promulgate it and submit it to His Majesty, the Exalted King, and publish it in the Official Gazettes in Libya.

In pursuance of the Resolution of the National Assembly we have promulgated this Constitution in the City of Benghazi on Sunday, the 6th day of Muharram, Hegera 1371, corresponding to the 7th day of October, 1951.

MOHAMED ABUL ASSAAD,
President of the National Assembly.

AWAR FAIELE SHENNIB,
BUBACHER AHMED BUBACHER,
Vice-Presidents of the National Assembly.

1962

AMENDMENT TO LIBYAN CONSTITUTION

(As Published in TARABLUS AL CHARB 9 December 1962)

We Idriss the First, King of the United Kingdom of Libya :

The Senate and House of Representatives have enacted the law whose text follows, which we approve and promulgate :

Article 1

Articles 36, 172, 173, 179, 182 and 184 are amended as follows : (The texts of these articles have been reproduced above).

Article 2

Articles 38, 180, 181 and 185 of the Libyan Constitution are cancelled.

Article 3

Each of the Ministers shall, in matters of his concern, execute this law, which shall be effective from the date of its publication in the Official Gazette.

(Signed) **IDRISS**

Issued in Rauda Palace on 11 Rajab 1382, corresponding to 8 December 1962.

1962

AMENDMENT TO LIBYAN CONSTITUTION

(Published in Federal Official Gazette No. 19 dated 12 December 1962)

Law No. 32 of the Year 1962

Amending certain provisions of the laws

We Idriss the First, King of the United Kingdom of Libya.

The Senate and House of Representatives having enacted the law whose text follows do approve and promulgate it :

Article I :

In all legislative enactments which have been issued by the Federal Government in accordance with Article 38 of the Constitution prior to its cancellation by the law issued 6 December 1962 amending certain provisions of the Constitution, wherefore the expression "Nazir", "Nazirate", "Executive Council", and "Province" is found replace it with the expressions Minister", "Ministry", "Council of Ministers", and "Federal Government". Furthermore all other expressions in these legislative enactments which indicate a provincial organ shall signify the corresponding federal organ, and this shall be effective from the effective date of the aforementioned law.

Article II :

Subject to the provisions of Article I hereinabove, the legislative enactments which are referred to in the foregoing Article shall continue in force and effect until cancelled or amended or replaced by other legislative enactments.

Article III :

The Ministers, each in the matters concerning him, shall execute the provisions of this law, and it shall be effective from the date of its publication in the Official Gazette.

(Signed) **IDRISS**

Issued in Beida on the 13th of Rajab 1382 H., corresponding to 10 December 1962.

By order of the King :

Mohamed Othman as Seid

President of the Council of Ministers.

1963

A LAW PROMULGATING A LAW AMENDING SOME OF THE PROVISIONS OF THE CONSTITUTION

We, IDRIS the First, King of the United Kingdom of Libya,

The Senate and the House of Representatives have passed the Law, the text of which follows, and the Legislative Councils have approved the provisions contained therein relating to the Federal form of Government, and we have sanctioned same and do hereby promulgate :—

Article One

The Federal System in the Kingdom of Libya shall be revoked, and shall be replaced by the system of the Unified (Single) State in the manner indicated in the Constitution and this Law.

Article Two

Articles 2, 3, 4, 26, 40, 44, 45, 68, 71, 79, 84, 85, 90, 94, 96, 98, 100, 101, 102, 103, 107, 109, 125, 126, 130, 172, 198, and 200, of the Constitution shall be amended as in the text indicated in Schedule No. 1 attached to this Law.

Article Three

The headings of each of Chapters IX and X shall be replaced by the following headings :— "The Financial System" and "The Local Administration".

The heading of Chapter III, with its Parts I and II, shall be revoked.

Article Four

(1) Articles 36, 37, 39, 95, 173, 174, 175 and 199 of the Constitution shall be revoked.

(2) The Articles contained in Chapters VIII, X and XII of the Constitution shall be revoked and shall be replaced by the Articles indicated, respectively, in Schedules Nos. 2, 3 and 4 attached to this Law.

Article Five

The words 'Federal' and 'United' wherever contained in the Constitution shall be deleted.

Article Six

The Ministers, each within his competence, shall execute this Law and it shall come into force from the date of its publication in the Official Gazette.

Issued at The Khold Palace on 2 Thi El-Higga 1382 H, corresponding to 25 April, 1963.

IDRIS

By Order of the King
Muhieddin Fakini

Prime Minister.

Mohieddin Fakini,
Minister of Foreign Affairs.

Mansour Qadara,
Minister of Finance and National Economy.

Wahba el-Bouri,
Minister of Petroleum Affairs.

Hamed El-Abeidi,
Minister of Planning and Development.

Wanis el-Qaddefi,
Minister of the Interior.

Seif Annaser Abdul-Gelil,
Minister of Defense.

Muhammad Kheikshi,
Minister of Industry.

Abdul-Latif Shweirif,
Minister of News and Guidance.

Omar Mahmoud Muntasser,
Minister of Justice.

Ahmad Bishti,
Minister of Health.

El-Mahdi Bouzo,
Minister of Labour and Social Affairs.

Ahmed Fouad Shennib,
Minister of Education.

Muhammad Yassin el-Mabri,
Minister of Communications and Public Works.

Hamed Abu Sreiweel,
Minister of Agricultural and Animal Wealth.

Ali Hisoumi,
Minister of State for Parliamentary Affairs and Conferences.

SCHEDULE No. 1

Article (2)

Libya is a State having a hereditary monarchy, its system of government is representative and its name is "The Kingdom of Libya".

Article (3)

The kingdom of Libya is a part of the Arab homeland and a portion of the African continent.

Article (4)

The boundaries of the kingdom of Libya are :—

On the North :— The Mediterranean Sea.

On the West :— The United Arab Republic and the Republic of the Sudan.

On the South :— The Republics of the Sudan, Chad, Niger and Algeria.

On the West :— The Republics of Tunisia and Algeria.

Article (26)

The right of forming peaceful associations shall be guaranteed and the method of exercising this right shall be regulated by law.

Article (40)

Sovereignty is to God and by His Eminent Will is entrusted to the Nation, and the Nation is the source of powers.

Article (44)

Subject to the provisions of Article 40, Sovereignty is the nation's trust to King Muhammad Idris el-Mahdi el-Senussi and after him to his male heirs, the oldest after the oldest, degree after degree.

Article (45)

The Throne of the Kingdom is hereditary in accordance with the two Royal Orders issued on 22 Safar 1374 H and 25 Rabi Thani 1376. Each of these two Orders regulating the order of succession to the Throne shall be deemed to be a constitutional measure.

Article (68)

The King is the supreme commander of all the Armed Forces in the Kingdom of Libya and their task shall be the protection of the sovereignty of the country, the safety of its lands and its security, and they shall include the Army and the Security Forces.

Article (71)

The King shall create and confer titles, ranks, decorations and all other signs of honour ; however, the creation of civil titles and ranks is prohibited.

Article (79)

Before assuming office the Prime Minister and the Ministers shall take the following oath before the King :—

"I swear by Almighty God to be loyal to the country and to the King, and to observe the Constitution and the Law, and fully protect the interests of the people."

Article (84)

The Council of Ministers shall be responsible for the direction of all the internal and external affairs of the State.

Article (85)

For the signatures of the King concerning the affairs of State to be effective, they must be countersigned by the Prime Minister and the competent Ministers. The Prime Minister shall be appointed and relieved of his office by a Royal Order, but the Ministers shall be appointed and relieved of their offices by Royal Decrees signed by the King and the Prime Minister.

Article (90)

The Ministers may not while holding office assume any other public office, exercise any other profession, purchase or rent any property belonging to the State, nor may they sell, rent or barter any of their own properties to it, and they may not directly or indirectly take part in the undertakings concluded and tenders invited by the public administration or the control of the State. They may not be members of the Board of Directors of any Company nor may they take an active part in any commercial or financial enterprise.

Article (94)

The Senate shall consist of twenty-four members who shall be appointed by the King.

Article (96)

In addition to the conditions provided for in the Electoral Law, a Senator must be a Libyan and his age on the day of appointment must not be less than forty Gregorian years.

Article (98)

The duration of membership in the Senate shall be for eight years. Selection of half of the Senators shall be renewed every four years, and any of the members whose term expires may be reappointed.

Article (100)

The House of Representatives shall consist of members elected by general secret ballot in accordance with the Electoral Law.

Article (101)

The number of Deputies shall be determined on the basis of one Deputy for every twenty thousand inhabitants or a fraction of that number exceeding half.

Article (102)

Voting is a right of Libyans who have attained twenty-one Gregorian years in accordance with the manner indicated in the law. A woman may exercise this right in accordance with the conditions prescribed by law.

Article (103)

A Deputy must:

(1) have completed thirty years of his age in accordance with the Gregorian calendar,

(2) have his name inscribed in one of the electoral rolls,

(3) not be a member of the Royal Family.

This shall be in addition to the other conditions provided for in the Electoral Law.

Article (107)

The order dissolving the House of Representatives must call upon electors to carry out new elections within a period not exceeding three months and must also fix a date for the convening of the new Chamber within the twenty days following the completion of the elections.

Article (109)

No one may be both a Senator and a member of the House of Representatives at the same time. Other cases of incompatibility shall be determined by the Electoral Law.

Article (125)

Except in cases of flagrante delicto, no criminal proceedings may be taken or proceeded with if already initiated against any member of Parliament while Parliament is in session nor may he be arrested except with the authorization of the Chamber of which he is a member.

Article (126)

Members of Parliament shall not be granted decorations or medals during their term of office, excepting therefrom those

members who occupy governmental offices not incompatible with Parliamentary membership, and also excepting military titles, decorations and medals.

Article (130)

The renewal of half of the members of the Senate must take place within the three months preceding the expiration of the membership of the retiring. If it is not possible to effect the renewal within the said period, the membership of the members whose terms have expired shall be extended until the appointment of the new members.

Article (172)

All the revenues of the State including proceeds from taxes, fees and other properties in accordance with the provisions of the Constitution and the Laws shall be paid to the Public Treasury.

Article (198)

For the purpose of reviewing this Constitution, each of the two Chambers shall by an absolute majority of its members adopt a resolution stating therein the necessity for and prescribing the subject of the review The two Chambers shall then, after discussing the matters which are the subject of the review, adopt their resolutions with respect thereof. Discussion and voting in each of the two Chambers shall not be valid unless three-quarters of its members are present, and for the resolutions to be valid they must be adopted by a majority of three-quarters of the members present in each of the two Chambers and must be sanctioned by the King.

Article (200)

Immigration into Libya shall be regulated by Law.
1.5.63.

SCHEDULE No. 2

CHAPTER VIII

The Judiciary

Article (141)

The Supreme Court shall consist of a President and Justices appointed by Decree, and they shall take the oath before the King before assuming their offices.

Article (142)

The President of the Supreme Court and its Justices shall retire on pension upon completing sixty five Gregorian years.

Article (143)

The Law shall determine the competences of the Supreme Court, and it shall also organize the other judicial bodies and specify the competences thereof.

Article (144)

The sittings of the Courts shall be open unless the Court decides to make them secret (held in camera) in the interest of public order and morality.

Article (145)

The Justices shall be independent and in their administration of justice they shall not be subject to any power other than that of the Law, and they shall not be subject to dismissal except as provided by Law.

Article (146)

The Law shall prescribe the conditions for the appointment of Justices, their transfer and discipline.

Article (147)

The Law shall regulate the functions of the Public Prosecution, its competences and its relationship to the judiciary.

Article (148)

The appointment of members of the Public Prosecution at the Courts, their discipline and dismissal shall be in accordance with the conditions determined by Law.

Article (149)

The Law shall regulate the system of the Military Courts and shall define their competences and the conditions which must be satisfied by those who occupy the office of justices therein.

30.4.63.

SCHEDULE No. 3

CHAPTER X

The Local Administration

Article (176)

The Kingdom of Libya shall be divided into Administrative Units in accordance with the Law which shall be issued in this regard. Local and Municipal Councils may be established therein and the Law shall specify the scope of these Units and shall also regulate these Councils.
30.4.63.

SCHEDULE No. 4

CHAPTER XII

Transitory and Provisional Provisions

Article (201)

Until the issue of the Local Administration Law, the Kingdom of Libya shall be divided into ten principal Administrative Units, to be named by a Resolution of the Council of Ministers, and each of which shall be presided over by an official who shall be appointed by a Royal Decree.

Article (202)

The Senate shall continue in its present composition until the membership of each of its members expires.

Article (204)

All Laws, Legislation, Orders and Notices in force in any part of Libya upon the coming into effect of this Law shall continue to be effective to the extent they are not inconsistent with the provisions of the constitutional and novel amendment until they lapse or are repealed, amended or replaced by other legislation enacted in accordance with the principles and rules prescribed in this constitution.

30.4.63.

EXPLANATORY MEMORANDUM
TO AMENDMENTS 1962

On 7 October, 1951, the National Constituent Assembly completed the drafting of the Constitution of the country and approved it. It then authorized the President and two Vice-Presidents to promulgate it.

When the Constitution was put into effect, the passing years showed as it was applied the need for amendment for certain of its articles, in the forefront of them Article 38. An example of this is :

The distribution of competence between the Federal Government and the Provinces in the Libyan Constitution mentioned in Articles 36, 38 and 39. The first sets forth the matters which are within the legislative and executive competence of the Federal Government. The second gives the subjects with which the Federal Government is concerned in a legislative capacity only, leaving to the Provinces the matter of their direct execution under the supervision of the Federal Government. Anything not mentioned in these first two articles falls within the competence of the Provinces as clearly provided in Article 39.

The practical application of Article 38 has raised various problems and many difficulties. At times both the Provinces and the Federal Government claim competence over a single question. At other times a Province is in dispute as to the extent of the Federal Government's right of supervision, which makes a proper degree of supervision impossible. Efforts have been made in vain to define this, and the public interest has been liable to be lost sight of in discussions on the questions of competence and the extent of the right of supervision. Things thus became complicated in many matters ; the problems and difficulties remained and the years passed and they still remained unsolved. This has led from time to time to voices being raised calling for an amendment of this Article, though they may have been faint at first. However, with the passage of the years the difficulties of application have become tremendous and have proclaimed the fact that all is no longer well in our Constitution. There is small wonder that these voices should have come to

gain a hearing and to call for a speedy amendment and improvement.

Perhaps it would be appropriate to set forth the circumstances and complications surrounding this Article at the time when the Libyan Constitution was drawn up, and the defects of the manner in which it was drafted. In this regard, we quote from Mr. Adrian Pelt, the United Nations Commissioner who was there at the time when the Constitution was drawn up and let him speak :

"59. The Working Group decided to begin by studying the question of the distribution of powers between the Libyan Federation and the Provinces. At its request, the Secretariat of the United Nations Mission provided it with an Arabic translation of the relevant chapters of the Constitutions of Indonesia, India, Germany (Bonn Government), Argentina, Australia, Brazil, Canada, Mexico, Burma, Switzerland and Venezuela."

"60. After an examination of these texts, the Working Group proceeded to discuss first the provision that was to be inserted in the Libyan Constitution to govern the distribution of powers. The United Nations Legal Adviser explained the different methods which could be adopted for that purpose. Some of the members thought that there should be a list of the Libyan Federation and another list of the powers of the Provinces, leaving all residual powers within the competence of the Federation ; others thought that it would be better to draw up one single list, giving the power of the Federation, all residual powers being left in the competence of the Provinces. The majority were in favour of the latter system, which was adopted by the Working Group. The latter, nevertheless, decided to divide the list into two parts, the first of which would enumerate the subjects which were to be within the legislative and executive competence of the Federation, while the second would contain those which were to be within its legislative competence only."

"61. After a long discussion, the Group reached the conclusion that for reasons of economy it was not desirable that the Federation should be responsible for the administration of the services in connection with all the subjects falling within its competence. It therefore decided to place certain subjects

within the legislative competence only to the Federation, leaving it to the Provinces to execute the laws under the supervision of the Federal Government."

"62. The Working Group decided that, in principle, powers in connection with all questions concerning foreign affairs, national defence, finance, communications, justice, public education and health, and various other important matters which generally come within the competence of a central government, should be exercised by the Federation." *(Second Annual Report of the United Nations Commissioner in Libya — Page 166 — items 59, 60, 61, 62).*

It is abundantly clear from the foregoing :

(1) That all matters included in Article 38 of the Libyan Constitution are primarily the competence of the Federal Government, not the Provinces.

(2) *For economic reasons,* owing to the fact, as we believe, that the country was in its first stages of independence, it was considered undesirable that the Federal Government should be responsible for the administration of those interests and bear the burden of them while it did not yet know the extent of its financial strength and to what degree it could be expected to shoulder the burden of all that was entrusted to its competence. The list covering the matters included in Article 38 was therefore divided so that the legislative authority should be assumed by the Federation and the Provinces should be responsible for the execution under the supervision of the Federation.

The time has now come for the Federation to take up its responsibilities in full, which, with the means at its disposal, it is well able to do. In doing this and taking over these powers, the Federation will be strengthened. In the strengthening of the Federation is a strengthening of Libya in all its three Provinces.

It is not untrue to say that the Federation was inspired to bring about this amendment by the questions and interpella-

tions of the Members of Parliament. How often were queries directed to Ministers and the desire of Members became apparent to call Ministers to account for their actions, and when a matter was raised or debated it was impossible to substantiate a shortcoming before a Minister because of the responsibility shared between him and the Nazir in the Province when the Province was responsible for execution under the supervision of the Federation ; and the extent of this supervision varied in each case. As it has been the desire of the Federal Government to bear full responsibility so that Ministers can give an account of themselves to the representatives of the people, it has been thought fit to make the desired amendment.

The Federal Government does not seek by amending the Article 38 to rob the Provinces of their rights and take them to itself, nor does it desire to enlarge its own sphere of competence at the expense of the Provinces. Equity demands that the proper situation is that the Federation should undertake its full competence in all matters in which it was originally to have assumed it at the time when the Constitution was drawn up. However, it was thought fit at that time, for specific reasons, to defer the assumption of responsibility by the Federation for a time.

When there was some revenue resulting from the executive function in those matters included in Article 38, it was considered that there was nothing to justify such revenue accruing to the Provincial Treasuries, but rather it should accrue to the Federal Treasury. Consequently, it has been necessary to amend Article 173 of the Constitution in accordance with this provision.

It is of considerable importance that the Federal Government should declare that the meaning of this is not that the Provinces should be abandoned and exposed to a deficit in their budgets but that the Federal Government has undertaken and will undertake its full obligations before the Provinces in this regard as required by the provisions of Article 174 of the Constitution. The Government allocates to the Provinces from its revenues annually sums in an amount that will enable them to fulfil their duties, and is proportionate to the growth of the Federal resources in such a manner that the Provinces are ensured of continuous progress.

The Federal Government feels itself in the position of an elder brother with his other brothers, taking them by the hand and helping them on to overcome the difficulties facing them wishing them well-being and prosperity.

The technical format of the amendment required that Article 38 be amalgamated with Articie 36 of the Constitution, which lays down the matters in which the Federation has legislative and executive competence—and refernce should be made to a matter of fundamental importance. That is, in making this amendment to adhere as much as possible to the phrasing of Article 38, as regards the matters included in it, unless a change is sometimes made absolutely necessary, lest the idea be spread around that the Federal Government has, under cover of amendment, inserted in its own interest matters which were not originally included in its own competence when the Constitution was drawn up. For example, in respect to banks, Article 36/29 provides that the Federation shall have competence in the matter of the Federal Bank. As banks were provided for in Article 38/2, this matter now comes within the competence of the Federation, and the arrangement of the technical format has necessitated that provision be made for the word "banks" only, without reference to the Federal Bank, since after the amendment there are not considered to be a Federal Bank and a Provincial Bank, but all matters relating to banks have been included in the competence of the Federation.

Also in the form of legal drafting it was considered sufficient to mention in Article 36 the competence of the Federal Government all matters included in this Article and in Article 38, without reference to the Federal Government's legislative and executive competence together in these matters ; and for the following reasons :

(1) Article 39 of the Constitution which refers to the competence of the Provinces makes no mention of the legislative and executive stages. So there is no sense in singling out the Federal Government to specify these two stages for the subjects that fall within its competence.

(2) The reason for referring to the legisiative and executive stages stems from the idea, at the time when the Libyan

Constitution was drafted, of drawing up a list of all the spheres of competence of the Federal Government, and when, as previously explained, it was thought fit to divide the list into two parts; the first comprising the spheres of competence of the Federation, legislative and executive in certain items included in Article 3, and a second part comprising the spheres of competence of the Federation from a legislative point of view only, leaving the executive competence to the Provinces under the supervision of the Federal Government. Thus if the Federal Government reclaims its competence in all the matters assigned to it, there is no justication for retaining or referring to the legislative and executive stages since it is assumed that the Federal Government will exercise full and uncurtailed competence.

(3) The expression "legislative and executive" is not precisely distinguished from a sound constitutional point of view, since the Libyan Constitution adopts the principle of differentiating between the legislative, executive and judiciary powers, and the judiciary is considered an independent power, which is referred to in several articles, such as Article 43, in Chapter IV entitled "General Federal Powers," and in Chapter VIII entitled "The Judiciary". Now judicial power according to certain constitutional jurists is not included in executive power.

And as long as the Libyan Constitution considers judicial power an independent power, it follows absolutely that it has an independent domain side by side with those of the other two powers. The business of the legislative power is to make laws; *i.e.*, to draft them, the function of the judicial power is to apply them, and the concern of the executive power is to implement them. So there is then an *independent stage* between the legislative and executive stage, and this is the stage of application. The Federal Government hold the three powers—that is to say, of legislation, application and execution—in matters within its competence. If the Constitution had confined itself to mentioning the

legislative and executive stages only, such an interpretation would have been neither comprehensive nor uncontroversial since it is admitted that the Federal Government holds the three powers. It was therefore seen fit to amend Article 36 with the following formula . "The Federal Libyan Government shall exercise *powers* in regard to the following matters", which is more precise in expression and fuller in meaning.

When the principle was approved of deleting the phrase "Legislative and executive", it became necessary to amend Article 172 which provides that the Federal Government shall receive revenues from all taxes and fees derived from matters within its competence—legislative and executive—under the provisions of Article 36 of this Constitution, by dropping the expression "legislative and executive".

Naturally the amendment also takes in certain articles in Chapter X of the Constitution, on the Provinces. It was accordingly seen fit from the point of view of technical format to combine Articles 179 and 180 of the Constitution, and to change the name of the Executive Council, calling it the "Administrative Council", in Article 182.

As a result of the distribution of powers as set forth in Article 36, it was not considered necessary for the Governor of the Province to supervise the execution of the federal laws therein. Article 181 of the Constitution was therefore deleted.

It was considered to be in the general interest that the Governor should preside over the Administrative Council and be responsible before the Legislative Council in the Province. Article 182 was amended to accomplish this.

Finally Article 183 has been amended so that its wording may be in conformity with the amendments in previous articles.

And now that the institution of the Judiciary has become federal with the amalgamation of Article 38 with Article 36, there is no longer any justification for keeping the judiciary power in the Province. Consequently it was necessary to delete Article 185 from the Constitution.

It is superfluous to point out that this new amendment is

not unprecedented. In truth and essence, part of it is only a formal amendment by which its original powers are restored to the Federal Government. As for the other part, it is an accepted principle that constitutions in every country have been drawn up to organize the affairs of society which is by nature evolutionary. This necessitates amendments in Constitutions whenever there is the need to facilitate the development of society.

The most cogent proof of this is that those who drew up the Libyan Constitution themselves anticipated its amendment to suit the conditions and circumstances of the country, which is a natural thing, and indicated the manner of amendment and pointed the way in Articles 196 onwards.

For these reasons that have been set forth the accompanying legislation was prepared, since it was considered that there was no escaping the requisite amendments to simplify matters and set things in order.

The Prime Minister

EXPLANATORY MEMORANDUM
TO LAW AMENDING CERTAIN PROVISONS OF THE CONSTITUTION

1963

On 7 December, 1962, the Constitution was amended in accordance with the contents of Law No. 28 of 1962. As soon as it was published the various groups and classes of the people demonstrated their pleasure for the amendments, and the peoples' wishes were quickly forwarded to the High Circles not only in support of the amendments but also requesting that the hoped for achievement, namely the full and comprehensive unification of the whole of Libya, be expedited.

When these wishes are met with complete acceptance, having a deep and pleasant echo among all, being consistent with and responding to the peoples' feelings and sentiments, for the definite privileges, prosperity and blessings the full unity bestows upon this peaceful and safe country, it is no wonder that the Government declared in its statement delivered before the representatives of the nation the outlines of its internal and external policy and announced its honest intention to immediately accomplish this national aspiration.

In fulfilment of the Government's promise and in response to what is desired by the souls of all, the Government has completed the present draft law in accomplishment to the country's longing for the achievement of this full unity under the wing and embrace of glory and sovereignty.

It is not concealed that the application of the Federal system in our country has revealed faults and flaws with respect to which we are not prepared to remain silent or ignore—and we suffice ourselve here to refer to some of them hereunder :

Firstly :—The faults and flaws of the federal system are apparent from the financial aspect. The existence of administrative bodies and councils representing the executive power and a large number of employees that are necessary to implement this system in the Provinces, in addition to the different bodies and employees of the Federal Government itself—have drained off and burdened the budget of the State with large expenditures.

Though the competences of the Provinces have been constrained and confined as a result of the Constitutional Amendments promulgated on 7 December, 1962, the several and multiple administrative bodies and councils in the Provinces are still a burden exhausting the budget of the State.

Secondly :—The faults and flaws are more apparent from the aspect of control—control by the Audit Department. For, when it is desired to have any (governmental) system or organization properly or appositionally applied and enforced it is inevitably essential that an apparatus or a system be set up, through which the soundness of such proper application can be ascertained and checked, and the functions of which shall be the control of the executive power, in all its different branches, in the performance of its work and the functions of its office. To properly carry out its duties of control, the Control Apparatus or System should work and be established on sound constitutional basis. And whereas the Federal System, with its requirement of distribution of powers and competence between the Federal Government and the Provinces, arouses and stirs up many difficulties, it has been impossible under this system to set up an effective and strong body for control and supervision which in its form and composition will be fully consistent with the constitutional provisions. Consequently, the control has not satisfied the purpose for which it was established.

In view of the faults and flaws that have been revealed in the course of the past years which faults and flaws have been uncovered through the application of the Constitution—what has been mentioned above is only some of them—sound judgment, for the guarantee of the welfare and prosperity of the people and for the maintenance and protection of the public interest, calls for the amendment of the Constitution in a manner to meet the needs of the nationals, and this shall be by giving up the federal system for a single unified State system which is both a simple and a flexible system and achieves the wishes of all nationals.

It is needless to mention that the adoption of the system of the single unified State is not a novel creation or contrivance in our country. It is admitted and recognised in constitutional jurisprudence that the switching of a State from the Federal

System to a full singly unified State rather than to a Union or United system is only a natural phenomenon and the usual end which the federal system leads to.

The existing Constitution has itself expected this result, and has expressly provided for it in its Article 199 :—"In the event of a review of the provisions concerning the federal form of government, such review must be approved, in addition to the provisions laid down in the preceding Article, by all the Legislative Councils of the Provinces. Such approval shall be expressed by a resolution taken in this respect by the Legislative Councli of each Province before the review is presented to the King for his sanction".

And when this has been determined, the proposed amendments to the Articles of the Constitution have all been required by the country's transition from the federal system to the system of a single unified State. The most important foundations on which the Constitution after its amendment is based are summarized hereunder :

Firstly :—The parliamentary representative system remained as it is, which is one of the fundamental guarantees in democratic States. Also, it has been seen fit to maintain the two Chambers system—the House of Representatives and the Senate —to avoid repercussion as it is observed that normally a single Chamber is inclined to self-exaltation and to favour itself with the powers, and also to avoid a chaotic relationship between Government Agencies. Furthermore, a dual Chamber provides the means for change in the method of composition in that it permits the representation in one Chamber of the elements that are not represented in the other with respct to qualifications and interests, and this provides sound and proper public direction.

Secondly :—Whereas the present Senate is formed on the basis that the State is United in a federal centralized form, in which the Provinces were equally represented, the switch to the single unified system calls for altering the foundation and basis under which the Senate is composed. The rule for the new composition has now come to be that all the members of the Senate shall be appointed. For one of the factors that straighten and correct the country's political life is to have, alongside

the member of the House of Representatives who are all elected, a group of persons who are able through their personal prestige, qualifications and past national and patriotic services to give due weight to their opinions in view of the knowledge, national credits and the experience they have attained from the works they have previously experienced—and thus they can introduce into the political life sage and mature opinions and judgments as well as sincere sentiments. However, many of these refuse to bring themselves to enter election campaigns for the House of Representatives, and therefore in many countries the doors of the Senate are opened for them by appointing them to its membership. In this way, the representation of the nation by such Senators is best accomplished.

Thirdly :—The number of the members of the Senate has been fixed at 24, and this is the number which the Senate had before. Furthermore, it has been taken into consideration in the amendment not to increase the number. For, it is a recognized fact in sociology, and also through observation of Chambers of large numbers, that the more the number of members the less useful are the discussions and the weaker is the independent and mature opinion.

The determining of the number as in the present case with respect to the Senate has been found to be a necessary requisite for good government under the country's present situation.

Fourthly :—With respect to the Local Administration, the Articles of Chapter X of the Constitution, relating to Provinces have been deleted, for there is no longer any need to maintain the system of the Provinces under the shade of full unification. This system has been replaced by a system under which the Kingdom of Libya has been divided into Administrative Units to be regulated by Law.

It is understood that the Law which shall regulate these principal units shall provide for the division of each unit into other sections, as required. The Administrative and Legislative Councils of the Provinces have been cancelled and it has been provided that local and municipal councils may be established in these new Administrative Units.

Fifthly :—With respect to the Executive Power, its Chief

Head is the King, which is a continuation of the existing state, who governs through his Ministers. Under the new situation the competence of the Council of Ministers becomes comprehensive including all aspects of the State in all executive matters, and, therefore, the Administrative Councils in the Provinces have been cancelled and all their powers have been taken over by the Council of Ministers.

Sixthly :—The judicial powers in the State shall be exercised by the Supreme Court and the other Civil and Sharia Courts of various degrees. They shall pass their judgments in accordance with the Constitution and the Laws and in the name of the King. To guarantee justice to all and to provide tranquility and security for justice so that they pass their judgments in accordance with what they seem just and right, it was expressly provided that they shall not be subject to dismissal except as provided by Law, this being their guarantee and in accordance with what is followed in all modern States.

On the occasion of this Constitutional reform it was deemed in the public interest to correct some of the existing provisions in the Constitution, or to rephrase them or amend them, as well as repealing some of them.

Before explaining some of these provisions, we wish to refer to some of the new points introduced by the constitutional amendments :

Firstly :—Article 40 of the Constitution provides that: "Sovereignty is vested in the nation and the nation is the source of powers". And whereas according to the unanimous and determined opinion of scholars of Moslem jurisprudence, sovereignty is in fact to the Almighty God, this provision was amended as to restore things to their proper place, and thus the new text reads : "Sovereignty is to God and by His Eminent Will is entrusted to the nation, and the nation is the source of powers". And consequently Article 44 was amended as follows : "Subject to the provisions of Article 40, sovereignty is the nation's trust to King Muhammad Idris el-Mahdi el-Senussi and after him to his male heirs, the oldest after the oldest, degree after degree".

Secondly :—Whereas the Kingdom of Libya is, as a tangible

fact, a part of the African continent, and in response to the desires of the peoples of our African Continent in their advancing and progressing procession, since God has blessed us in being Arabs and of Arab descent, having Arab brotherhoods with responding feelings and harmonious aspirations, it is fitting that Article three of the Constitution should embody these two facts.

Among the other amended provisions are the following:

(1) Article 67 which provided that "The King is the supreme commander of all the Libyan Armed Forces' 'has been clarified to show that the words "the Armed Forces" include both the Army and the security forces which is a confirmation of the situation existing prior to the Amendment. The Article, after its amendment, has also clarified the task of these Armed Forces, namely, the "protection of the sovereignty of the country, the safety of its lands and its security".

(2) Article 71, which provided for the King's right to create and confer titles, ranks, decorations and all other signs of honor, has also been amended. The established fact is that the King did not, since the dawn of independence up to now, use his right in conferring civil titles such as the title of Bey or Pasha. In addition, these civil titles no longer suit the developments of the modern age. Thus, the text was amended to conform with this objective and abide by wise policy followed by the King. This amendment, therefore, is proper and acceptable and agrees with the democracy of Islam and its principles of equality."

(3) The text of Article 79 which provides for the Prime Minister and the Ministers to take an oath before the King before assuming office was also amended. This Article did not include the text of the oath and it was seen fit to correct this discrepancy in the text by expressly providing the text of the oath.

(4) Similarly, in the case of Article 90 which specified the acts which the Ministers are forbidden to carry out while holding office. This Article was also amended to prohibit a Minister from disposing of any of his properties to the State through sale or barter.

(5) The text of Article 102 was amended to permit a

woman to exercise the right of voting in accordance with the conditions which shall be provided by Law. The woman is half of society, and modern legislation has been inclining towards giving the woman her natural right in participating in public life. She has occupied public positions and the doors of the University have been opened for her. Therefore, to proceed with the development it has become inevitably necessary to give her the right to vote.

The technical phraseology of some of the Articles was also corrected. Of those, is Article 85 which provided: "For the signatures of the King concerning the affairs of State to be effective, they must have the counter-signatures of the Prime Minister and of the competent Ministers, provided that (with the exception of the decrees appointing the Prime Minister or relieving him of office shall be signed by the King alone and decrees appointing Ministers or relieving them of office shall be signed by the King and countersigned by the Prime Minister".

Whereas the King signs alone the instrument of appointment with respect to the Prime Minister, this instrument, from the technical constitutional aspect is described as a "Royal Order" and not a decree. Also, the words: "provided that" (with the exception of) contained in this Article may lead to the feeling that the King may not issue any Royal Order except in the case of the appointment of the Prime Minister. This is not true and was not intended. Lawfully, the King may issue other Royal Orders other than the order issued appointing the Prime Minister.

Some of the Articles were cancelled:

(1) Either as a result of the new constitutional amendment, such as the cancellation of Articles 141 through 195 concerning the Federal Supreme Court, as they have been replaced by other Articles in Chapter VIII of the Constitution which embodies the judiciary, which Articles have dealt with the Supreme Court, the other courts and the Public Prosecution; and such as the cancellation of the Articles contained in Chapter X relating to the Provinces. The "Provinces" were also cancelled and the Articles of this Chapter were replaced by other Articles concerning the Local Administration.

(2) Or because some of the Articles have fulfilled their purposes as is the case in the Articles contained in Chapter XII of the Constitution which include transitory and provisional provisions. The cancelled Articles were replaced by other Articles suitable to the requirements of the situation, for example :

With respect to the existing Senate, it is neccesary to reconstitute it in accordance with the new basis ; and whereas this takes some time, long or short, it has been thought in the public interest to insure the continuity of the work of the Legislative bodies, to have the Senate continue in its existing composition until the term of membership of each of its members expires.

Finally, it is an admitted fact that the success of the organic law in the State depends upon the extent of its suitability to the customs of the inhabitants in their original environment. The provisions of the Constitution in any state are enacted merely for guaranteeing the national interests, and for preparing the way for the establishment of internal justice and tranquility, the means of defense, the protection of the sovereignty and the safety of the State, and to guarantee the principles of liberty and equality.

To the extent the Articles of the Constitution accomplish the above purposes and pursue these ends and objectives, the judgment on the soundness and success of the Constitution will be placed.

We should not overlook the fact that what is suitable to a specified State at a specified time may not be suitabe to that State at another time. The Parliamentary system, like other systems of government, does not grow and develop unless it finds the proper environment which is suitable to it. All the desires have met in the selection of the unified single state system for our country.

It is fitting for us all to extend to our inspired leader the August King many thanks and confessed gratitude for this blessed step which his esteemed wisdom has contemplated and perceived and to which he has given his full support. We proceed with the blessings of God who is the guide to the right path.

MUHIEDDIN FEKINI
Prime Minister

CONCLUDING REMARKS OF THE UNITED NATIONS COMMISSIONER IN LIBYA

Supplementary Report. — 1952

In concluding his final account to the General Assembly on the performance of his mission to Libya, the Commissioner may be permitted to turn to the future and give expression to a few words of hope and advice.

The Commissioner has stated repeatedly that the Libyan people's strongest asset is its desire to live as a united people in an independent State. That desire is now to be satisfied. Not only has independence been formally proclaimed, but Libya has made its entry into the family of nations without any ties which its Government will not be free to sever, modify or continue solely in the light of the country's interests or affinities. At the same time, it is impossible to disregard the fact that Libya's emergence as an independent State coincides with a serious international tension. Nor can it be forgotten that the country is geographically situated in an area at present afflicted by strong political and ideological conflicts. It is to be hoped, therefore, that the Powers interested in its future, which associated themselves, under the aegis of the United Nations, in the forging of Libya's destiny, will respect its new status. Its as yet inexperienced and young government should be enabled to consolidate the political, economic, and social position of the new State. In view of the special responsibility which the United Nations has assumed and recognized, the Organization and its specialized agencies should consider it their duty to play a leading part in a co-ordinated plan of external assistance to Libya.

The Libyan Constitution is a reasonable one, inspired by a spirit of democracy and respect for human rights. To what extent this opinion will be shared by the Libyan people will become fully evident only when the Constitution has been put to the test of experience. Some observers may argue that, taking into account Libya's social, economic and political state of democracy. The Commissioner does not share that view. When a politically adolescent people acquires its first constitutional

advancement, the Constitution now adopted represents too advanced a form of garment, it seems wiser to allow a size permitting a degree of political growth, rather than to select one of such tight-fitting proportions as to risk congestion in the body politic.

As appears from the Commissioner's two annual reports and from his present report, Libya, if it wants to survive as an independent State, will have to solve two fundamental problems, one political in nature, the other economic.

The political problem consists of developing and consolidating its newly established unity. To desire unity, however, ardent and sincere that desire may be, is not in itself sufficient to make it function in practice. In the political life of the country, tensions will occur, such as antagonism between the verying interests and outlooks of the three territories as well as between those of the various social groups composing Libya's population, which may well put Libyan unity to a severe test.

To regulate its political life, to offer an outlet for internal conflicts, and methods by which those conflicts can be solved, the Libyan National Assembly has given the country a democratic Constitution providing for a monarchy on a federal basis. As far as human judgment and foresight permit us to look into the future, this system seems likely to correspond to Libya's particular needs, but it is not an easy system to apply. To ensure its success, the Libyan leaders will have to deploy at least the same measure of wisdom and tolerance, and the same sense of public spirit of which they have shown themselves capable when drafting the Constitution. Even then, trials and errors will be unavoidable but the Commissioner feels justified in expecting, that these will not reach a point at which unity and independence might be endangered. On the contrary, if wisely faced in accordance with prescribed constitutional processes such trials and errors may well prove useful lessons in the conduct of the country's political affairs.

Libya's second fundamental problem is caused by its poverty, the exact effect of which on the standard of living has, for decades, been partially hidden from public view as the result of continuous external aid in some form or another. Even with this aid, the standard of living has remained low. What would

become of that standard if such aid prematurely came to an end may be left to the imagination of the reader. It is therefore indispensable, if the United Nations decisions for an independent Libya are to bear fruit in the future, to continue this aid for several years to come in a form adapted to the country's particular conditions. However, even the most generous and best planned external aid will not enable Libya's economy to follow an ascendant line of development unless the Libyan people themselves do their share in increasing their standard of living. This will require great efforts on behalf of people who so far have suffered from lack of sufficient education and professional training and whose soil contains but scanty natural resources. It will also demand a great deal of self-imposed discipline in the implementation of economic and social development plans, of self-restraint in politics and administration, and last but not least an increase in labour output. In brief, what is required of them is a gradually growing consciousness of the old truism that independence cannot simply become a reality by claiming the right to be independent ; it also requires a preparedness to carry the burden of duties inherent in independence. If such a new consciousness is gradually to permeate the masses of the people, the leaders must give the example. All this will take time. It would be unrealistic to expect an overnight change in age-old customs, social patterns and ways of thinking. Undoubtedly, new concepts of economic, social and political behaviour will have to be adopted and absorbed, but they should be grafted on the old tree of the Libyan way of life. Only by such a process of synthesis will it be possible to develop a new type of Libyan community life capable of raising the standard of living. The nature of the synthesis which will have to come about has been defined by the International Islamic Economic Organization meeting in Karachi in a joint declaration of all the participating countries expressed in the following terms :

> "In the economic field we advocate a system in which prosperity and development is the security and guarantee for the personality and well-being of all. We consider that an undeveloped or a backward area is a challenge to the conscious and enlightened self-interest of the whole world. Within the brotherhood of Islamic countries we recommend

application of economic co-operation and mutual exchange of knowledge and expansion of trade. The directive principle of our social policies, based on the timeless teachings of Islam, is the well-being, prosperity and the dignity of the common man, so that the personality of every individual is afforded full scope to develop."

The Libyan people owe their independence as much to the United Nations as to their own efforts. From now on they will have to direct their efforts towards new goals so as to make the best possible use of their new status, while the United Nations will have to continue recognizing the special responsibility which it has avowedly assumed in granting Libya independent statehood. By following a democratic way of life respecting human rights and by concentrating on peaceful economic and social development, the Libyan people can best repay their debt of gratitude to the United Nations and thus continue to merit the foreign assistance they will require in the future.

THE SUPREME COURT OF THE UNITED KINGDOM OF LIBYA

PRESIDENT: *Chief Justice* Mohamed Khalil Gemati

MEMBERS: *Justice* Hassan Abu Alam
Justice Osman Ramzi
Justice Awni Dajani
Justice James Robinson
Justice Sheikh Mansour Mahjoub

CONSTITUTIONAL OPINION

1. The extent of the responsibility of the wali and the scope of his jurisdiction.
2. The determination of the meaning of "supervision" of the implementation of the federal laws as required by article 38 of the Constitution.

JURISDICTION OF THE COURT

The Constitution of the United Kingdom of Libya, article 152, provides:

> The King may refer important constitutional and legislative questions to the Supreme Court for an opinion. The Court shall examine such questions and inform the King of its opinion, taking into account the provisions of this Constitution.

The Federal Supreme Court Law 1953, article 18, makes a similar provision except that the reference of questions to the Court may be by the Federal Government, by a provincial governor or by the president of the Senate or of the House of Representatives. The Rules of Court of the Federal Supreme Court, articles 43 to 47, require that questions submitted by any of the officials named in article 18 "shall be accompanied by a statement of the facts and setting forth in detail the matters on which the opinion is requested" (article 43), and that "each opinion shall set out in detail the facts of the matter under consideration and the rules of law applicable to it" (article 46).

The Court now has before it a request for a constitutional opinion. The request is submitted on behalf of the King by the chief of the Royal Diwan accompanied by a brief dated 10th July 1955 and signed by the legal adviser of the Royal Diwan. The request states two subjects on which an opinion is desired. It is presented under the direct mandate of the Constitution, article 152. It is not accompanied by a statement of facts. A principle followed by federal supreme courts, however, is that a court does not or cannot take jurisdiction of abstract questions of law but requires concrete statements of fact showing an issue of law raised in a controversy between adverse parties, one of whom is frequently the federal or provincial government or an official or agency thereof. The courts observe that only a precise question can get a precise reply. They observe further that there is danger that a supreme court's opinion on a mere general question of constitutional law might later be cited as determining a case to which it does not apply. Such caution probably has contributed to the requirements laid down by the Supreme Court rules 43 and 46 as quoted above.

The Court has taken notice in previous opinions and deliberations, however, of situations of fact which may be considered to be typical sources of issues of law such as those now presented for the Court's opinion. For example, the Wali of Tripolitania, acting under article 70 of the Organic Law of Tripolitania (Amendment and Approval) 1954, was reported to have assumed to exercise the power to "grant pardon and remit or commute sentences", although, as this Court pointed out in a decision, article 77 of the Constitution of Libya specifies that it is the King who "shall have the right to grant pardon or to commute a sentence." It is reported also that there have been cases in which the Federal Minister of Education proceeding under article 38 of the Constitution requested but failed to obtain essential official provincial information from a provincial Nazir of Education. It is common knowledge, moreover, that in the federal states having supreme courts there arise common or typical situations of fact in which these courts are called upon to help officials of the federal government on the one hand and officials of the local or provincial governments on the other hand to find the constitutional boundaries and balances between them. Such common or similar factual situations may

be usefully kept in mind in dealing with requests not accompanied by specific statements of fact.

The Court, because of the foregoing reasons and subject to the considerations and cautions stated above, accepts jurisdiction as requested and presents its opinion on the questions stated.

I. THE WALI

The first questions is presented to the Court as follows :—

> What is the extent of the responsibility of the Wali and the scope of his jurisdiction ?

Under the Constitution of Libya the wali or governor of each of the three provinces of Libya is both a federal officer and a provincial officer. Being liable before the federal authorities, he is responsible before the King through the Council of Ministers in federal matters. Similarly he becomes responsible before the King and before the Legislative Council of the province if he exercises any purely provincial executive powers.

Article 181 gives the wali chiefly federal powers and duties by these words :

> The Wali shall represent the King within the province and shall supervise the implementation of this Constitution and of the federal laws therein.

Article 184 gives the wali both provincial and federal powers and duties by these words :

> The functions of the Wali shall be determined by the Organic Law in each province, subject to the provisions of article 181......

Article 181 of the Constitution and the organic law of the province determine the two fundamental duties of the wali, namely :—

> (1) He "represents" the King in the province, and
>
> (2) He "supervises" the enforcement or the execution of the Constitution and the laws within his province.

In providing that the wali "represents" the King, the law does not in any sense mean that the wali even locally or tempo-

rarily stands in the place of the King or personifies the King or has any personal privilege or power of the King. On the contrary the word "represents", here as elsewhere in the Constitution, as in the Preamble,—"we the representatives of the people of Libya", and in article 108,—"each member of Parliament represents the whole people", clearly has its common usage and dictionary meaning, namely, "to serve with delegated authority or in a special capacity". The King appoints the wali and relieves him of his post. If the wali fails to represent the King and federal government efficiently and loyally, the Council of Ministers may submit the matter to the King who, after appraising the situation, may remove the wali.

The other duty of the wali in the province, namely, to "supervise" the enforcement or implementation of the Constitution and laws, likewise gives the wali no independent powers. This duty makes him legally and politically responsible, under his acceptance of the office from the King and his oath of office before the King, to "supervise", that is, to "oversee for directing" or to "oversee and direct", the carrying out in his province of the mandates of the federal Constitution and of the laws.

II. "SUPERVISION" UNDER ARTICLE 38

The second question is presented to the court as follows :—

> What is the constitutional meaning and usage of the word "supervision" as used in Article 38 ?

The article, under the heading "Joint Powers", reads as follows :—

> 38. In order to ensure a coordinated and unified policy between the provinces, the legislative power relating to the following matters shall be within the competence of the Federal Government, while the executive power in connection with the implementation of that legislation shall be within the competence of the Provinces acting under the supervision of the Federal Government.
>
> (The "following matters" then listed are 27 in number.)

To understand the meaning of supervision of the implementation of the federal laws, as provided in the above article,

it is necessary to consider (1) the meaning of the word "supervision" as commonly used ; (2) the apparent intent of the people of Libya in the drafting and adopting of the Constitution ; and (3) the practice in other federal nations.

(1) The Common Meaning of "Supervision"

In common usage, as confirmed by the dictionaries of various languages, including Arabic, English, French and German, to "supervise" means "to oversee for direction." It is useful, for example, to refer to the fact that Article 38 of the Constitution of Libya corresponds to article 15 of the German Constitution of Weimar, 1919, and to articles 84 and 85 of the new German Constitution of Bonn. The word used in these two German constitutions is "Aufsicht", the literal meaning of which is the same as the English "overseeing", that is, "supervision". The "supervision" according to the three German articles cited above includes the following powers and functions :—

1. The right of the federal government to send to the province directions and general orders.
2. The right of the federal government to send to the province commissioners for supervision.
3. The obligation of the province (the *'land'*) on the request of the federal government to avoid any deficiency in the execution. If any disagreement arises on such a point the case is to be submitted to the Supreme Court.
4. The federal supervision extends as far as the appreciation of legality and suitability of the manner of execution adopted, which may require information substantiated by documents to be given by the province to the federal government, if requested.

(2) The Intended Meaning of "Supervision"

The intent or purpose of those who drafted the Constitution appears to have been to use the term "supervision" in its common meaning as stated above. This intent appears in (*a*) the other provisions of article 38 ; in (*b*) paragraphs 55 to 61 of the

Second Annual Report of the United Nations Commissioner in Libya; and in (*c*) the history and circumstances of the people of Libya as factors in their drafting and adopting the Constitution.

(*a*) The first clause of article 38 states that the purpose of the article is "to ensure a coordinated and unified policy between policy between the provinces". The draftsmen could not have expected the article to achieve this purpose if they had then failed to place a single competent authority over the three provinces implementing and executing the federal legislation on the matters listed in the article. They therefore placed the sole supervising authority in the Federal Government. If the Supreme Court should now interpret the constitutional provision to mean merely "observation" and not "overseeing for direction", the Court would thereby be defeating the expressed purpose of the article to ensure provincial coordination and unification.

Another provision of article 38 pointing to intended federal direction in these matters is the placing of the legislative powers in the Federal Government. In drafting and enacting such legislation the Federal Governemnt can specify what the provincial governments shall do and shall not do in implementing the legislation, and how Federal supervision over provincial action or failure to act shall be carried out. The Federal statute may expressly provide for Federal assistance for the provincial governments in implementing the legislation, and methods of instructions or other coordination and unification may be indicated by the statute.

(*b*) The intended meaning of supervision under article 38 is indicated in the Second Annual Report of the United Nations Commissioner in Libya following the deliberations of the Working Committee of the Constitutional Committee and the deliberations of the National Assembly. The Report shows that the makers of the Libyan Constitution tried to promote economy, and that they therefore left to the provinces the execution of these matters. It was natural in such a case that the Federal Government would have the supervision of such execution in order to ensure coordination and unification.

(*c*) The intent of the Libyan Constitution-makers to use

"supervision" to mean Federal "overseeing for direction" is corroborated by the circumstances and history of Libya. The people of Libya after World War II and after a long and bitter struggle wished to unite in a strong, free and sovereign State. The two resolutions of the United Nations, namely, the Resolution of 21st November 1949 and the Resolution of 17th November 1950, were the fruit of this struggle for natinoal sovereignty. At the same time, the people of Libya individually desired to make secure their individual personal freedom against a possible future totalitarian unitarian over-centralized government. The people, therefore, through their National Assembly acting by the Resolution of 2nd December 1950, adopted the principle that the Libyan State should be federal in form.

(Second Annual Report of the United Nations Commissioner in Libya (Paris, 1951), page 13.)

(3) The Practice in other Federal Nations

In taking this action the people of Libya were meeting practical difficulties and differences in the way in which similar problems have been met by other peoples, that is, by establishing a federal nation under a written constitution. These federal nations include, with Libya, the United States, Canada, Australia, Switzerland, Brazil, Argentina, Mexico, Burma, India, South Africa, the Soviet Union, Venezuela, Yugoslavia, Germany and Pakistan. The people of Libya realised, however, as other federalized people have realised, that a federal government so established, in order to survive and to succeed, must have supremacy according to the Constitution over the states or provinces of the country. The people therefore, provided throughout their Constitution that the Federal Government of Libya should be supreme in accordance with the Constitution over the administrations of the provinces. In view of this background, therefore, it is reasonable to assume that the Libyan Constitution-makers, in giving to the Federal Government in article 38 powers of "supervision" over the Provinces, intended that term to mean a power which implements the supremacy of the Federal Government.

If the people of Libya and their federal and provincial governments may occasionally have difficulties or even disputes

in regard to the relative powers and duties of the Federal Government and the provincial administrations, this experience likewise is similar to the experience of other federal nations. The experience of the United States as the oldest federal nation may be considered to be typical. This experience has been described in an authoritative book on *American Government* (Ogg and Ray, 10th edition, 1951, page 48) as follows :—

> "When the Constitution's framers wisely decided upon a national government resting directly upon the people, as the state governments also did, they opened up a question around which much of our later history has revolved, namely, that of what relations should exist between nation and states. Indeed, out of the differences of view upon this matter arose long and bitter disputes which not only tested to the utmost the Supreme Court's capacity for constitutional interpretation, but at one stage, plunged the conutry into devastating civil war. Never yet has the question been answered in full, nor in truth can it be ; for in a dynamic, changing society governemental powers simply cannot be defined and circumsscribed with such precision and finality as to prevent people from construing them differently in the face of new circumstances and needs. In a country like England, with all public authority concentrated in a single national government, no difficulty arises. But our system is "federal", not "unitary" ; except in a few fields such as foreign relations, powers are divided or distributed, by fundamental law between a national government and 48 state governments. And no legerdemain of constitutional phraseology can prevent the division from giving rise to endless doubts and challenges along its tortuous border lines. In America, as elsewhere, federalism has proved an exciting adventure."

The scope of supervision and the relative powers and duties of federal officials and state officials have required interpretation also in the United States, but now (as the above writers point out, at pages 82 and 84), the earlier competition and friction and even war beteen the American states and the United States Government have been succeeded chiefly by a cooperative, coordinated and nationally united federalism. The nation and the states cooperate in many joint and reciprocal governmental activities, which include several of the joint powers listed in article 38 of the Libyan Constitution, as for example, education (art. 38, clause 23) and public health (art. 38, clause 25).

The federal-provincial relationship which is involved in general in the questions under consideration, particularly the relative operations of the federal and provincial governments and officials, has required the attention of the Supreme Court of the United States in many cases. A leading case involving joint powers over elections offers a useful illustration. The *Siebold* case, volume 100 U.S. Supreme Court Reports, page 371 (1880), dealt with the question whether the Federal Congress had the power constitutionally to impose duties upon State election officials in connection with the election of members of the Federal Congress and could prescribe additional penalties for the violation by such state officials of their duties under state law. The Supreme Court said that the Federal Government had such power. The Court stated :

> "The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience whether in his individual or official capacity."

This statement by the Supreme Court of the United States only repeats a provision of article 6 of the Constitution of that country. It is also the same provision as article 6 of the Constitution of that country. It is also the same provision as article 6 in the organic laws of both Tripolitania and the Fezzan.

The Supreme Court of Libya would like especially to point out that while dealing with federal legislation the Libyan Constitution gives the provinces in article 38 the right to execute only and this provisions means that the only competent power in the provinces that has any connection with article 38 is the executive power and this fact definitely leads to the conclusion that the legislative councils have nothing to do with the matters specifically reserved to the federal legislative power under this article and the legislative council consequently cannot question the provincial executive on these matters.

FOR THESE REASONS

Having in view article 152 of the Constitution
and in the light of the preceding provisions of the Libyan Constitution and of federal doctrine

and within the scope of what has been submitted to the Court the answer to the first question will be the following :—

1. The extent of the responsibility of the wali and the scope of his jurisdiction :

   The wali is always responsible before the King through the Council of Ministers for the respect of the provisions of the Constitution and for the implementation of the Federal laws within his province. Regarding matters referred to in articles 39 and 176 of the Constitution, the provnices are bound to respect the provisions of this Constitution.

And the answer to the second question will be the following :

2. The determination of the meaning of "supervision" over the implementation of Federal laws as required by article 38 of the Constitution :

   The Federal Government in legislating on the matters enumerated in article 38 of the Constitution will have the right of supervision over the execution of such matters, and "supervision" means "overseeing to direct".

And all of the foregoing is to be carried out in an atmosphere of cooperation and reciprocal support, which, above all, is the pillar of success of the federal system.

Signed : **Mohammed Khalil Gemati**
President

Hassan Abu Alam
Osman Ramzi
Awni Dajani
James Robinson
Sheikh Mansour Mahjoub
Justices.

July 1955.

ERITREA
ETHIOPIA

ERITREA - ETHIOPIA

Total Area	—	398,350 sq. m.
Ethiopia	—	350,000 sq. m.
Eritrea	—	48,350 sq. m.

Federation Population : 18–20 million

CONTENTS

A FEDERATION CREATED UNDER THE DIRECTION OF THE UNITED NATIONS BETWEEN AN INDEPENDENT EMPIRE AND A NEIGHBOURING COUNTRY FAILS TO SURVIVE AND IS EVENTUALLY INCORPORATED INTO THE EMPIRE.

FEDERATION OF ERITREA AND ETHIOPIA

HISTORICAL BACKGROUND

The ancient Kingdom of Ethiopia, now a sovereign independent State, is a mountainous volcanic country with an area of 250,000 square miles and a population of some 20,000,000. It was invaded by Italy in 1935, and freed by British forces in 1941, when its present ruler, the Emperor Haile Selassie resumed his throne.

Eritrea is a small undeveloped country, wedged in between Ethiopia, the Sudan, and French Somaliland,—one-fifth the size of Ethiopia and with a population of scarcely over a million. One half of the population live in the central Eritrean plateau which comprises a quarter of the area of the country, with mountains ranging to 8,000 feet; the remainder in the Western Province reaching from the Sudan border to the Red Sea. Roughly the people are equally divided between Moslem and Christian. The bulk of the population is rural—the urban residents of some 200,000 being concentrated in the cities of Asmara and Massawa, the indigenous population of the former being predominantly Coptic, and that of Massawa and other urban centers mainly Moslem.

Italian colonisation began in 1890. "Eritrea was created, and so named, by the Italians, who established their first colony towards the end of the nineteenth century in this small sliver of territory on the western shores of the Red or 'Erytean' Sea. Before this Eritrea had never enjoyed any form of unity, had never had a government of its own, had never even had a name" [1]. In 1936 Ethiopia, Eritrea and Somaliland were united

---

(1) Eritrea. A Colony in Transition, 1941-1952, G.K.N. Trevaskis, Oxford University Press, 1960 (p. 4). An admirable short review of the Eritrean problem by a former British Official with long service in that country, now High Commissioner in Aden and to the Federation of South Arabia.

into the Italian East African Empire. The country remained under Italian administration until the entry of the Allied Forces in 1941. The whole of Eritrea fell under British occupation with the capture of Massawa, the Red Sea Port, a week after the offensive of Rommel which overran Cyrenaica.

At the conclusion of World War II, the disposition of the former Italian colonies was presented to the Allied Powers for solution. The Joint Declaration of the Four Powers in 1947 provided that if, with respect to any of the former Italian territorial possessions, the Four Powers were unable to agree upon their disposal within one year of the coming into force of the Treaty of Peace with Italy, the matter should be referred to the General Assembly of the United Nations for recommendation "and the Four Powers agree to accept the recommendation and to take the appropriate measures for giving effect to it." By the subsequent treaty, Italy renounced "all right and title to the Italian territorial possessions in Africa", *i.e.,* Libya, Eritrea and Italian Somaliland.

The problem facing the Powers in connection with the disposition of Eritrea was a singularly difficult one—complicated both by reason of the diversity of the peoples in race and religion, and by the historical links of Eritrea and Italy. Independence or a union with Ethiopia were strongly supported alternatives but to both of which there were serious objections. In many ways the two countries were interdependent. Eritrea, a poor country, had been kept alive largely by Italian and British bounty. As remarked by the United Nations Commission in 1950 (1) :—

> "Eritrea, (*a*) is largely sub-desert and an inherently poor farming country. Her known mineral deposits are negligible. She has practically no local sources of power. In the absence of any rich sources of raw materials, of domestic power or of widespread industrial skill, Eritrea can have no real industrial future ;
>
> (*b*) has, therefore, neither the resources nor the revenue to make her economically viable in the foreseeable future."

---

(1) Report of the United Nations Commission for Eritrea. General Assembly Official Records. Fifth Session. Supplement No. 8 (A-1285) p. 16.

On the other hand, as a result of Italian development, Ethiopia had become heavily dependent on the port of Massawa, and there were in addition strong historical claims. As the artificial creation of the war, Eritrea was a fiction rather than a political reality. Ethiopia had exercised effective sovereignty over a large part of the Eritrean highlands before the installation of the Italian regime. But the Christian Abyssinians would not accept a union with their Moslem neighbours and the Moslem half of the country, in turn, was equally opposed to it. Nor would Ethiopia accept an independent Eritrea. "Experience had taught her that unless she had the key to her own front door she would never be secure." Eritrea had served as the base for four foreign invasions of the country in less than a hundred years, including the Fascist conquest in 1935. Again a trusteeship was impracticable. The great mass of population would have actively opposed it.

Faced by this dilemma, the Powers, in 1947, despatched a Commission to Eritrea in search of a solution. Its members were an Englishman, an American, a Frenchman and a Russian. The Commission remained in Eritrea for six weeks. Its Report registered sharp differences of opinion (1), and offered no acceptable solution. In due course, therefore, the problem came before the General Assembly of the United Nations, which in 1949 reached the decision to set up another Commission to ascertain more fully the wishes of the people and to report on proposals "for the solution of the problem of Eritrea." The Commission was composed of five members, representatives of Norway, Guatemala, South Africa, Pakistan and Burma. It also remained in the country for a period of six weeks and, like its predecessor, ended up with a sharp division of opinion as expressed at length in two separate memoranda submitted on the one hand by the delegations of Burma, Norway and the Union of South Africa and on the other by those of Guatemala and Pakistan.

The joint proposals of the delegations of Burma and South Africa are of special interest as foreshadowing the solution

---

(1) See Four Power Commission Report, p. 36. (Quoted Trevaskis op. cit. pp. 89-90).

eventually adopted by the United Nations [1]. Their memorandum observes :—

> "The delegations of Burma and South Africa are not satisfied that the rights and interests of the large Moslem community would be fully safeguarded in every respect, and if they were that the general body of Moslems would believe it, if Eritrea were to be incorporated outright into Ethiopia, as the Unionists desire. The two delegations consider, however, that the over-riding aims of political and economic association between Eritrea and Ethiopia and of effective safeguards for the rights and interests of the Moslems and the Italian and other minorities could be achieved by means of a federation of Eritrea and Ethiopia. Such a federation, should take place on terms compatible with the self-respect and domestic autonomy of both countries and provide for joint responsibility and collective action in such fields as defence, external affairs, taxation, finance, inter-State commerce and communications. A customs union and a general rule of non-discrimination would also be pre-requisites."

As opposed to the above the Norwegian delegation recorded its views in emphatic terms :— [2]

> "Having regard to the fact that the Eritreans are so far removed from the stage where they could govern themselves, that, regardless of the number of the claimants, the claim for independence has to be dismissed, we consider the reintegration of Eritrea into Ethiopia as the only rational and satisfactory solution. In principle this solution should apply to the whole territory of Eritrea. It seems to us impossible to give way to the separatist wishes of that part of the population of the Western Province which, in refusing union either with Ethiopia or Sudan, aims at the setting up in this area of a separate independent State. This can only be characterized as a utopian and unrealistic dream."
>
> The reunion of Eritrea to the "mother country" would, in our opinion, offer the best guarantees for the peaceful existence of Eritrea's inhabitants, native or foreign, and give them the best conditions of security. On the other hand, it is certainly to be feared that an independent

---

(1) Report of the United Nations Commission for Eritrea, p. 25.
(2) Op. cit., p. 27.

> Eritrea, poor as it would be and helplessly exposed to interference from many sides, would soon become the scene of serious discord and internal strife. [1]

The third group comprising Guatemala and Pakistan concluded in favour of independence:

> "We believe the best solution for the future of Eritrea to be independence. But, at the same time, we are of the opinion that independence cannot be made effective immediately. Therefore, the welfare of Eritrea can best be promoted by placing the territory under direct trusteeship by the United Nations for a maximum period of ten years, at the end of which it should become completely independent." [2]

Faced by this indecisive counsel, the General Assembly of the United Nations, on December 2nd, 1950, reached the answer to its problems. It had been five years since the conclusion of the Peace Treaty—"five crowded years of argument, bargaining and lobbying"—a period which had been fruitful in exploitation of political enmities. The solution was a compromise—the adoption of the federal plan proposed by Burma and South Africa. The Resolution of the Assembly not only prescribed the federal type of government but elaborated its essentials in what was designated as the "Federal Act," whose first article declared that Eritrea should constitute "an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown". (See, Documents No. 1).

The first and most fundamental problem was as to the relations between the two members of the Federation—on the one hand an unorganised political body, divided within itself and without any accepted leadership—and, on the other, an established State under the leadership of an able and ambitious King. It was accepted that the sovereignty of Ethiopia should be respected and that her constitution should remain untouched. A separate Eritrean Constitution would be prepared and submitted for adoption by the Eritrean people. There would be no

(1) The Norwegian delegate was for many years the writer's colleague on the Court of Appeals of the Mixed Courts of Egypt. He was a realist of vigorous mind and strong common sense.

(2) Op. cit., p. 3.

separate Federal Constitution or Federal Government. The Ethiopian Government would be the Federal Government but the principle of Federation would be established in the Federal Act, to which the Emperor would give his solemn adhesion. The rights of the Ethiopian people as represented in both its controlling Legislative Assembly and in the Federal Administration would (it was assumed) be thereby guaranteed.

By the terms of the United Nations Assembly Resolution, the Federal Act and the Eritrean Constitution were to enter into effect jointly, following the adoption of the Constitution by the Eritrean Assembly, its approval by the United Nations Commissioner and the ratification by the Emperor, accompanied by the formal ratification by the Emperor of the Federal Act.

The plan followed in the drafting of a constitution had been specifically prescribed by the Federal Act. The United Nations Commissioner was directed to prepare a draft "in consultation with the Administering Authority (Great Britain), the Government of Ethiopia and the inhabitants of Eritrea." In pursuance of his duties the Commissioner entered upon an elaborate series of consultations, including political parties, religious leaders, foreign communities and economic, cultural and professional organisations. Among the questions on which answers were specifically solicited were the following:—Should there be one or two Assemblies? For what period should the Assembly or Assemblies be elected? Of what should the Executive consist—how nominated—and what the relations between the Executive and the Assembly? Should the Emperor be represented in the Executive and should he take part in constituting the Government? Should universal suffrage be established? What should be the official language. Should Eritrea have a special flag?

The Commissioner was also able to call upon the collaboration of two successive Panels of Legal Experts. The first of these comprising Sir Ivor Jennings, Dr. Rijpperda Wierdsma, the Dutch jurist, and Dr. Paul Guggenheim of Geneva University, advised him in the early stages of his work on the international obligations involved in the fulfilment of the resolution of the General Assembly. The advice included the following conclusions:—

1. The General Assembly's recommendation is binding upon the four Great Powers which are parties to the Treaty of Peace with Italy, since in that Treaty they agreed to accept the recommendation ;

2. The Governments which voted for the resolution had a political and moral duty to comply with it ; if they failed to comply they would be going back on their decision and jeopardizing the conduct of international affairs. Yet they are not legally bound by the mere fact of their vote, since for the Members of the United Nations as such, the General Assemly's resolution only formulates a recommendation ;

3. If Ethiopia refused to ratify the Federal Act or the Constitution adopted by the Eritrean Assembly, the whole question of the disposal of Eritrea would have to come before the General Assembly again. Hence the importance of the duty, previously mentioned in paragraph 20(1)*b* of this report, of consulting the Government of Ethiopia when preparing the draft Constitution.

When finally completed the Constitution (1) was ratified by a representative Assembly of Eritreans, chosen by the people, and together with the Federal Act was ratified by the Emperor on September 11, 1952, upon which both instruments came into effect and the Federation was inaugurated.

The final clause of ratification, under the seal of the Emperor, reads as follows :—

> "Whereas said Constitution as so approved, adopted and ratified contains provisions adopting and ratifying the Federal Act on behalf of the people of Eritrea ;
>
> Now, therefore, We, Haile Selassie I, Elect of God, Emperor of Ethiopia, as Crown and Sovereign of the Empire of Ethiopia as constituted prior to the present action by Ourselves of Ratification of the Federal Act as above-recited and quoted, and as henceforth and from this date constituted by the action and fact of the present ratification of said Federal Act do hereby approve, adopt, and ratify said Federal Act and by such action and fact do hereby declare, in full force and effect, the Federation of Eritrea with Ethiopia under the Sovereignty of the Ethiopian Crown as represented by Ourselves ; and We do

(1) See Documents, No. 2.

further command all Our Faithful subjects throughout the Empire of Ethiopia as henceforth and from this day constituted, full respect of and obedience to said Federal Act, as now placed by Ourselves into full force and effect and to all federal laws issued pursuant thereto." [1]

The inauguration of the Federation was accompanied by many expressions of good will and high hopes but also by some significant reservations on the part of its artisans and well-wishers. The ceremonies included a public address by the Emperor and official congratulations by the head of the Diplomatic Corps and the Eritrean Chief Executive, recorded as follows in the official report of the Commissioner.

> "The Doyen of the Diplomatic Corps congratulated the Emperor on that occasion which had considerable political and historical significance. The Federation which would come into being on the ratification of the Federal Act was a great human achievement doing honour to those who had conceived it and to those who had carried it out. The free and willing union of two brotherly peoples, in these troubled times, was a striking example of peaceful co-operation and conciliation.
>
> The Eritrean Chief Executive followed with an address in which he pointed out that the Federation of Eritrea and Ethiopia marked the end of sixty-seven years of struggle. The natural ties of ethnology and history would thus be re-established, thereby recognizing a natural state of affairs. The Eritrean people knew and appreciated all that the Emperor had done for them and offered him their loyalty.
>
> Conflicting political trends had ceased to exist among the Eritrean people. They were now united in their acceptance of Federation with Ethiopia.
>
> Both the letter and the spirit of the United Nations resolution, which made provision for the Federation, had been put into effect by Eritrea. The ratification of the Eritrean Constitution and the Federal Act by the Emperor was an historic event which gave the Eritreans people faith in their future.
>
> The Emperor then thanked the Doyen of the Diplomatic Corps and the Eritrean Chief Executive.
>
> The final legal act for the establishment of the Federation was thus formally completed."

---

(1) Final Report, U.N. Commissioner in Eritrea. General Assembly Official Records, 7th Session Supplement No. 15. (A-2188).

In the conclusions of the Final Report the United Nations Commissioner makes the following observations :—

> "That Constitution, together with the organic laws passed by the Eritrean Assembly, faithfully reflects not only the letter, but also the spirit of the resolution ; so far as any document can, it gives Eritrea a fair and promising start in its existence as an autonomous unit within the Federation.
>
> Much more than a mere document will be required, however, to ensure life and continuity for the institutions thus created. The Federation and Eritrea will have to learn to live side by side, each respecting the proper sphere of activity and jurisdiction of the other. As the first Panel of Legal Consultants pointed out, "the régime prescribed in the General Assembly's resolution .... can only operate satisfactorily if Ethiopia accepts it freely and without any unexpressed reservation, and intends to apply it in good faith."
>
> My conversations with His Majesty the Emperor of Ethiopia have convinced me that such good faith exists and that it is the Emperor's sincere desire that the Federal Act should be implemented in accordance with both the letter and spirit of the resolution.
>
> On the Eritrean side, the discussions I held with the people from the outset, and the spirit in which the Eritrean Representative Assembly adopted the Constitution have convinced me that there is a genuine readiness for full cooperation with the federal authorities and real respect for the unity of the Federation under the sovereignty of the Emperor."

ERITREA AND THE FEDERATION

The position of Eritrea in the new Federation is laid down with precision in the Federal Act, all of whose provisions were incorporated into the Eritrean Constitution. The Act was composed of seven articles of which the first five alone refer to the structure of the State, as follows :—

1. Eritrea shall constitute an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown.
2. The Eritrean Government shall possess legislative executive and judicial powers in the field of domestic affairs.

3. The jurisdiction of the Federal Government shall extend to the following matters :— defence, foreign affairs, currency and finance, foreign and interstate commerce and external and interstate communications, including ports. The Federal Government shall have the power to maintain the integrity of the Federation, and shall have the right to impose uniform taxes throughout the Federation to meet the expenses of federal functions and services, it being understood that the assessment and the collection of such taxes in Eritrea are to be delegated to the Eritrean Government, and provided that Eritrea shall bear only its just and equitable share of these expenses. The jurisdiction of the Eritrean Government shall extend to all matters not vested in the Federal Government, including the power to maintain the internal police, to levy taxes to meet the expenses of domestic functions and services, and to adopt its own budget.
4. The area of the Federation shall constitute a single area for customs purposes, and there shall be no barriers to the free movement or goods and persons within the area. Customs duties on goods entering or leaving the Federation which have their final destination or origin in Eritrea shall be assigned to Eritrea.
5. An Imperial Federal Council composed of equal numbers of Ethiopian and Eritrean representatives shall meet at least once a year and shall advise upon the common affairs of the Federation referred to in paragraph 3 above. The Citizens of Eritrea shall participate in the Executive and Judicial branches, and shall be represented in the legislative branch of the Federal Government, in accordance with law and in the proportion that the population of Eritrea bears to the population of the Federation. (1)

As will be observed, the problem of relations between the new State of Eritrea and the existing Empire of Ethiopia was met in the Federal Act by the recognition of the continued sovereignty of Ethiopia as an international personality. In his Final Report the United Nations Commissioner thus referred to the question (p. 20) :—

---

(1) Final Report, p. 45.

"The question of the identity of the Empire of Ethiopia in relation to the Establishment of a Federal Government was examined, and the Panel's opinion was that at the international level the Federation would not create any new legal entity replacing Ethiopia or existing in conjunction with Ethiopia. (202)

The Panel studied the provisions of the Federal Act concerning the Federal Government and agreed that the legal interpretation of the "sovereignty" of the Ethiopian Crown must not entail any change in the respective jurisdictions of the Federation and of Eritrea as laid down in paragraphs 2 and 3 of the resolution. (203)

The term 'sovereignty', while affirming the formal unity of the Federation, also means that acts by the Federal Government can be performed in the name of the Emperor. It does not prejudge the scope of the Emperor's powers in federal matters, which will be fixed by federal law in conformity with the Federal Act. The Federal Government will clearly be able to maintain Federal services in Eritrea." (204)

CONTROL OF FEDERAL GOVERNMENT OVER ERITREA

Referring to the first two paragraphs of the Federal Act and relying on the fact that the United Nations Resolution described Eritrea, not as a 'state' but as 'an autonomous unit'.... —the Ethiopian Government maintained that the Emperor was to exercise certain powers in Eritrea—notably those implied in the obligation under paragraph 3. "to maintain the integrity of the Federation". The reply of the Legal Panel to the Commissioner's request for an opinion on this point was as follows. (p. 20) :—

> "The Panel considered that the provision in paragraph 3 of the resolution according to which "the Federal Government shall have the power to maintain the integrity of the Federation", did not mean that respect for the respective jurisdictions of the Federation and of Eritrea was a question to be decided by the Federal Government alone ; for if it were interpreted as having that meaning there would no longer be a true federation. The Panel admitted that respect for the jurisdiction of both parties could only be effectively ensured by the establishment of a federal court independent of both the Federal and the Eritrean Governments and competent to settle disputes

> between them. Members agreed however, that the provision would enable the Federal Government to take the necessary measures to maintain the integrity of the Federation in case of any situation in Eritrea involving disorder, revolution or secession. Nevertheless, such intervention would only be justified if the Eritrean Government were unable or unwilling to deal with any such situation." (205)

CONSTITUTIONAL GUARANTEES

One of the defects with the Constitution as adopted was the absence of any judicial power for the solution of conflicts between the Federal Government and that of Eritrea. The matter is twice referred to by the United Nations Commissioner in his Final Report. In speaking of the power of the Federal Government, he observes :—

> "Nevertheless, the Federation certainly does not possess a unilateral power of decision as regards the application of these provisions and the matter was raised during the discussions of the Representative Assembly. Any difficulties which may arise in this connection will have to be settled by a federal tribunal appointed for the purpose by the Federal Government and consisting of both Ethiopian and Eritrean judges."

Again, in remarking on the incomplete nature of the procedure provided for in the case of alleged unconstitutionality of an Eritrean law, he writes :—

> "These safeguards can only be provided by the setting up of an impartial Supreme Court with powers to settle conflicts of jurisdiction between the Federation and Eritrea in the final instance."

ROLE OF THE EMPEROR

As the federation is a monarchy under the sovereignty of the Ethiopian Crown, the role of the Emperor extended to all federal matters. While the Federal Act contains no provisions on the subject, the Constitution provides for a representative of the Emperor in Eritrea. As the Commissioner observes in his Report (p. 47) :

> "The problem was to give the Emperor's Representative constitutional status by including this office in the Eritrean constitutional system, without impairing the

> autonomy of Eritrea, and thus to establish a link between the Crown, at the head of the Federation, and the democratic institution of Eritrea." (527)

As an indication of the fixed limits of the Emperor's authority, provision is made for a speech from the throne before the Eritrean Assembly "in which he will deal with affairs of common interest to the Federation and to Eritrea". Beyond that he may not go. The speech may not deal with Eritrean domestic affairs, nor its internal policy and may not be followed by any discussion or vote of the Assembly. Careful provision, however, was made to prevent the Assembly from encroaching on federal powers. All draft legislation was required to be transmitted to the Emperor's representative who, if he considered it an encroachment on federal jurisdiction, or involved the international responsibility of the Federation, might ask for a reconsideration. If the Assembly insisted by a two-third majority on the adoption of the legislation it was to be transmitted to the Representative of the Emperor for promulgation. As the Commissioner reports :—

> "This procedure is clearly incomplete and limited. It only applies to Eritrean and not to Federal laws. It does not necessarily result in a final decision on the constitutionality of the law complained of, for the Assembly can nevertheless proceed to adopt the law alleged to be unconstitutional by a two-thirds majority vote."

Here again there was need for the setting up of a Supreme Court with power of settling conflicts of jurisdiction between the Federation and Eritrea.

ERITREA AND THE LEGISLATIVE POWERS

The rights of Eritrea in respect of the Federal Government —that is to say, in the Ethiopian Government acting in compliance with the Federal Act—are expressed in two forms :—

> *First*, the presence in an Imperial Federal Council of a number of representatives equal to that of the Ethiopians.
>
> *Second*, participation in the "execution and judicial branches"—and representation in the legislative branch... in accordance with law—and "in the proportion that the population of Eritrea bears to the population of the Federation."

Ample scope for uncertainty and for conflict was offered here. To begin with the powers of the Imperial Federal Council were not prescribed in the Constitution. In the Federal Act, however, (par. 5), it is provided that the Council shall meet at least once a year "and shall *advise* upon the common affairs of the Federation...." Commenting on the role of the Council the Commissioner observes in his report :—

> "The existence of the Imperial Federal Council will allow the representatives of Eritrea to express their opinion on federal laws which they might regard as encroaching on Eritrean jurisdiction."

As to participation of Eritrea in the Executive legislative and judicial branches of government, it is to be noted first that all such participation is to be "in accordance with law", *i.e.*, the manner prescribed by a legislative in which the proportion of Eritrean representation is relatively small—subject only to the injunction that such participation must be in accordance with the ratio of her population to that of the Federation. Neither the Federal Act nor the Constitution offered any procedure calculated to insure the respect of this injunction.

CONSTITUTIONAL AMENDMENT

The Federal Act contained no provision for its amendment. It provided, however, (Art. 13), for the drafting of a Constitution which should enter into effect following approval by the Commissioner, adoption by the Eritrean Assembly and ratification by the Emperor—all of which formalities, as already noted, were formally accomplished.

The Constitution (Art. 91-93), however, does contain precise dispositions covering its amendment. No amendment may be introduced by the Assembly "which would not be in conformity with the Federal Act", nor may the article (Art. 16) declaring that the Constitution is based on the principles of democratic government, be amended. The procedure for amendment is carefully prescribed—and amendments are to enter into effect "after ratification by the Emperor, Sovereign of the Federation."

In commenting on this clause, the United Nations Commissioner, in his Final Report, observes (p. 51) :—

"Article 93, paragraph 3 of the Constitution provides that any amendments thereto will enter into effect after ratification by the Emperor of Ethiopia. The resolution of the United Nations General Assembly provides (paragraph 13) that the Constitution of Eritrea shall enter into effect following ratification of the Federal Act and the Constitution by the Emperor of Ethiopia. The Constitution follows up this provision by giving permanence to the intervention of the Sovereign of the Federation.

From a strictly legal standpoint the intervention of the Emperor of Ethiopia appeared essential. The Constitution could not enter into force without ratification by the Emperor. His ratification was given to a particular text and any modification or amendment of that text must therefore be ratified by him. This is the application of a traditional principle of law, namely, the principle of the converse act or identity of procedure. Against this principles of the converse act it could, however, be objected that ratification by the Emperor of Ethiopia is not prescribed in the Federal Act. Such ratification is required by the General Assembly's resolution, together with approval by the United Nations Commissioner, as a condition for the entry into force of the new Constitution. It is not prescribed for the future.

The main legal basis of article 93, paragraph 3, of the Constitution is to be found in the practice of Federal States. The Constitutions of the member States are directly or indirectly subject to examination by the federal State. The purpose of such examination is to ensure that local constitutions respect the principles laid down in the Federal Constitution.

Thus the provision contained in article 93, paragraph 3, might appear in the Federal Constitutional Laws, enacted to implement the Federal Act. In order to avoid any difficulty of interpretation, however, it seemed advisable to insert this provision in the Constitution as well. The Assembly supported this view unanimously, except for four abstentions.

Ratification of amendments to the Constitution by the Emperor of Ethiopia is all the more necessary because paragraph 7 of the Federal Act requires the Federal Government to ensure respect for human rights and fundamental liberties in Eritrea. The Federal Government must therefore be in a position to prevent suppression or restriction of these rights and freedoms by the Eritrean Constitution.

The purpose of federal ratification, however, defines its scope. Refusal of ratification will only be possible in respect of amendments at variance with the provisions of the Federal Act, and in such a case ratification must be refused."

CITIZENSHIP

The problem of citizenship was covered by the Federal Act (Art. 6), as later incorporated into the Constitution (Art. 8). The American and Swiss system is adopted, providing for both Federal and Eritrean citizenship, with a reciprocity clause establishing the equality of treatment of nationals of the Federation whether they are residents in Eritrea or Ethiopia, but which does not require that persons of federal nationality be guaranteed the *same* rights in both parts of the Federation. Equality alone is required.

TAXATION — FEDERAL AND STATE

The division of power—both as to assessment and collection is carefully prescribed, first by the Federal Act—and next by the Constitution. By the Federal Act power is conferred on the Federation to impose uniform taxes to meet purely federal expenses, Eritrea to bear only its just and equitable share. The Constitution, in turn, imposes on Eritrea the duty of assessing and levying such taxes, in its territory "by delegation from the Federal Government" (Art. 6). Here we note a significant difference from the system originally adopted in the Libyan Constitution, under which the collection of taxes in matters under the exclusive power of the Federal Government was the concern of that Government, subject to its right (Art. 32) with the agreement of any Province, to delegate to it such powers, the Federal Government bearing the expenses of execution. Another difference in the two systems is that, in the case of Libya, the Federal Government was required to consult the Province before presenting its federal tax-bill to the Parliament. It was further required to allocate to the Province sufficient funds for the conduct of public affairs.

REPRESENTATIVE GOVERNMENT IN ERITREA

The Federal Act provided that the Constitution of Eritrea should be based "on the principles of democratic government". Seeking to avoid, on the one hand, the dangers inherent in a parliamentary system without national roots to support it—and, on the other, the autocratic government that might be expected from installing a presidential system in a new democracy, the Constitution makers established what the Commissioner refers to as a "semi-presidential system"—a strong executive having wide powers but elected for a fixed term by the Assembly with Civil Service and the corps of public officials placed under the authority of an independent Civil Service Commissioner. Provision is also made for an Electoral High Commission of three persons, appointed by the Supreme Court, with the duty not only of compiling electoral rolls but also of supervising electoral proceedings and preventing irregularities. As to the election of the members of the unicameral Assembly, the Constitution offers the alternative of two voting systems—a direct ballot in one stage and an indirect ballot in two stages, the effect being to ensure a fair representation of different elements in the population.

ORGANIC LAWS

As a number of the articles of the Constitution referred to laws whose existence was necessary to the functioning of government a series of such laws was prepared by the United Nations Commissioner with the assistance of the British Administrator and was voted by the Assembly to enter into effect simultaneously with the Constitution. This list bore the following titles :—

(1) The Administration of Justice Proclamation.
(2) The Eritrean Functions of Government Act.
(3) The Eritrean Electoral Act.
(4) The Eritrean Budget Act.
(5) The Eritrean Audit Act.
(6) The Eritrean Advisory Council Act.
(7) The Eritrean Civil Service Act.

None of the statutes mentioned has any special bearing on federal relations, being concerned rather with internal administration of the State.

The Administration of Justice Proclamation carried into effect the integration into a single system of courts of the several juridical institutions which had grown up following first of all the establishment of Italian juridical procedure and secondly the supervening military and later, civil administrations. It established the judiciary as a separate organ of the government independent of executive, and recognised the judiciary as the guardian of the Constitution with inherent powers to enforce constitutional rights.

The Eritrean Functions of Government Act implemented various provisions of the Constitution relating to public administration, including the appointing by the Chief Executive of the secretaries and the submission of questions to the Executive by the Assembly.

The Eritrean Electoral Act implements the provisions of the Constitution on this subject and defines and qualifies Eritrean citizenship. It also develops the two alternative voting systems of direct and indirect ballot established by the Constitution.

The Eritrean Budget Act covers generally the method to be followed in preparation of the Budget and its subsequent enactment.

The Audit Act implements the article of the Constitution relating to the Auditor General and his duties. Similarly the Advisory Council Act implements the provision of the Constitution establishing an Advisory Council for the achieving of economic and social progress in Eritrea.

It is interesting to note the following summary of the Eritrean economic position as presented by the Commissioner :—

> "Owing to a conjunction of political, geographical and natural circumstances, Eritrea is at present a poor and undeveloped country with a lop-sided economy and a dearth of resources both in natural products and in trained and educated human material. To remedy these defects and to balance both her economy and her budget, she needs and for many years to come will need the help and advice of foreign experts. The purpose of Article 84 of the Constitution is to provide a body which, without interfering in the internal politics of the territory, will possess such

> authority, permanence, knowledge and readiness of access as to enable the Executive and the Legislature in Eritrea to co-operate in a continuous effort to surmount the existing social and economic difficulties of the country."

Finally, in the Eritrean Civil Service Act we find provisions for the powers and activities of the Commission.

Such, in brief, is the story of the founding of the Eritrean-Ethiopian Federation and the outlines of its structure as established under the aegis of the United Nations.

The chapter closes and we pass into another realm, that of attempted realisation—and ultimate failure. Before doing so, however, it will be of interest to record the cautious judgment pronounced by a commentor of exceptional experience, Sir G.K.N. Trevaskis, whose work on Eritrea has already been referred to.

> "Eritrea is now an 'autonomous State federated with Ethiopia'. The old colonial régime, which in its Italian and British forms had lasted for more than sixty years, has ended ; and authority is now shared by Ethiopians and Eritreans.
>
> No federal or other constitutional device can paper over Eritrea's fundamental weaknesses ; its natural poverty and the disunity of its people. Eritrea's future, and indeed the Federation's, is likely to depend on the extent to which these weaknesses can be overcome.
>
> Eritrea has not the means of financing development or even of palliating economic distress. Left to its own resources it would be unable to maintain the comparatively simple educational system existing at the end of the Occupation. Its own revenue could never support sufficient force to maintain security without military backing. It has no alternative but to lean heavily on Ethiopia. Whether it seeks for Ethiopian or foreign financial aid it can only turn to the Ethiopian Government. For military support its own Government must depend on Ethiopian co-operation and good will.
>
> It must be remembered that Ethiopia has always contended that Eritrean autonomy was impracticable, and that full and complete union alone would meet the needs of the two countries. Eritrean's dependence on Ethiopian charity may seem to justify this attitude in the past and to provide sufficient excuse for Ethiopia if she should not exploit her

position as patron to bring about the union she has always demanded. That she might be tempted to do so is understandable. With an Ethiopian Governor General and an Ethiopian garrison in the territory, with Ethiopian control of the broadcasting services, and with Eritrea dependent on Ethiopian financial aid, she has the means of paralysing any Eritrean Government and of putting an end to any semblance of Eritrean autonomy. She would, however, be ill-advised to do so. As senior partner in the Federation, Ethiopia has a right to expect Eritrea to follow her leadership loyally ; in return for financial and other aid she has a right to expect Eritrea to listen to her advice and be considerate of her interests. What she cannot legitimately demand or expect is Eritrean subservience.

It is for Ethiopia to make her choice. The temptation to subject Eritrea firmly under her own control will always be great. Should she try to do so, she will risk Eritrean discontent and eventual revolt, which, with foreign sympathy and support, might well disrupt both Eritrea and Ethiopia herself. Though an autonomous Eritrea has admittedly unwelcome implications for Ethiopia, her need for a loyal and stable Eritrea far transcends any inconvenience a federal relationship may impose upon her. It is to her own interest as well as to Eritrea's that she should ensure that the Federation survives in the form its authors intended. The future of the Federation, and indeed of the whole group of young countries in North and East Africa, is likely to be affected by the course that Ethiopia takes. She has acquired a great responsibiilty."

DISSOLUTION OF THE FEDERATION

On November 15, 1962, an official proclamation was made in the name of Haile Selassie, Emperor of Ethiopia, (Order No. 27 of 1962), terminating the federation of Ethiopia and Eritrea. On the same day an address by the Emperor was made to the Nation in explanation and justification of the action taken.

The operative clause in the Order reads as follows :—

> "2. The federal status of Eritrea with Ethiopia is hereby terminated, and Eritrea, which continues to constitute an integral part of the Empire of Ethiopia, is hereby wholly integrated into the unitary system of administration of Our Empire."

Succeeding clauses provide that the Ethiopian Constitution of 1955 shall "continue to be the sole and exclusive constitution,

to apply uniformly throughout the territory of the Empire of Ethiopia" (thus by implication repealing the Constitution of Eritrea); that existing rights of Ethiopians or foreigners within Eritrea, shall remain in effect; that the rights and obligations of "the former administration of Eritrea" shall become the rights and obligations of the Ethiopian government; and that existing laws in force in Eritrea, or which are declared to be of federal application, shall, as far as necessary to the operation of existing administration, remain in force until repealed.

The Speech from the Throne is essentially an appeal to the unity of a historic Ethiopia with only a secondary emphasis on economic or administrative considerations.

The Speech opens with the statement :—

> "When the name of Ethiopia first appeared in the pages of history, Eritrea formed an integral part of Our Nation."

The choice elected by Ethiopia will appear as we proceed. The succeeding paragraph refers to the action of the 'colonial powers' in separating Eritrea from the rest of Ethiopia, with the aim of establishing a separate Eritrean identity "and to disassociate Eritrea from the Mother Land." In the next paragraph we read that after the 'invaders' had been driven from the soil, "the international political situation was such that, unfortunately no measure of Eritrean unity with Ethiopia could be immediately attained" hence the imposition of a federation which "had been requested by no one". The paragraph following bears the significant title "Alien Imposed Federation". The speech then for the first time refers to the unfortunate effect of the federation in slowing the speed of economic and social progress—and of "creating misunderstandings among people who have for centuries past experienced no problem in living together", and proceeds to record the "formal request" of the Ethiopian people on November 14, 1962, for a dissolution of the federation. The speech closes with an appeal to Unity and with the following reference to the action of the Eritrean Assembly.

> "The people of Eritrea, through their representatives gathered together in the Eritrean Assembly, recognising the harmful consequences of the operation of the federal

> system through the experience of the past decade, desirous of living together with their other Ethiopian brothers without hindrance or obstacle, have formally requested, by their resolution voluntarily and unamously adopted on November 14, 1962, that the federation be dissolved. In its place, they have asked for the complete administrative integration of Eritrea with the rest of Ethiopia in order to facilitate and speed the economic growth and development of the nation. We have accepted this resolution and have consented to its being placed into effect."

The above is the only available official statement of the action of the Assembly. As to the actual circumstances surrounding the taking of this action it is impossible to pronounce beyond recording the generally accepted statement that the decision was made by acclamation without formal counting of votes. Strong allegations have been made in the extensive literature circulated by dissident Eritreans to the effect that the decree was the result of continued pressure by the central authorities, and of manoeuvres and various forms of intimidation, extending over several convocations of the Assembly, the dates of which are specified. Apart from these *ex parte* allegations, reliable sources of information point to the existence of a considerable degree of pressure by the authorities, but without any evidence of actual violence.

These sources also support the conclusion that the action of the Government was the result, not of economic but of political considerations,—a conclusion sufficiently confirmed by the frank statements of the Speech from the Throne. It is also significant that in the Speech from the Throne, delivered by the Emperor on November 2, two weeks before the Speech of November 15, dissolving the federation, no reference whatever is made to any such proposed action. The speech merely refers to statements made in the earlier speech as to "measures under consideration", whereby administrative authority will be delegated to local administrations to direct their own activities "in certain designated fields"—a statement which gives no warning of the radical decision which presumably was already in contemplation.

THE WORKABILITY OF THE FEDERATION

Quite apart from the dominating political motives which were responsible for the action of the Emperor, the queries which the reporter has made upon the spot tend to support much of the criticism expressed in the Emperor's speech. In a long interview with one of the most eminent jurists in the country,—a man of Anglo-Saxon education and member of its highest court—this gentleman specified in detail, and with emphasis, the various functions of government wherein the federal government had been impotent. What, he asked, were foreign affairs, public defense, communications, etc., worth when it came to establishing a policy of economic and social welfare for the whole country ? Government action was paralyzed. A modern State, he alleged could not function in these conditions.

However, there seems little doubt that throughout the life of the Federation the Ethiopian Government took every opportunity to assert and strengthen, through the activities of the federal civil authorities, as well as through the presence of military units, the powers of the central government at the expense of the local administration.

LEGAL ASPECTS OF TERMINATION

The Order of Termination of the Federation contains no reference to the legal basis for the action taken in its relation to the Resolution of the General Assembly of the United Nations on which the Federation was founded. Nor does any such reference appear in the Annual Speech from the Throne of the preceding November 5th.

It will be recalled that the Eritrean Constitution, as approved by the United Nations, and by the Eritrean representatives and ratified by the Emperor, *prohibits* the Assembly (Art. 91) from introducing any amendment into the Constitution "which would not be in conformity with the Federal Act.", which, as will have been noted, is specific in establishing a strictly federal system.

It is of interest also to recall that among the questions on which the United Nations Commissioner sought the advice of

the Panel of Legal Consutlants, to which reference has already been made, was the effect to be given to the Resolution of the General Assembly after the entry into force of the Federal Act and the Constitution. The answer of the Panel to this question was the fololwing, (pp. 19-20) (Italics added) :—

> "With regard to the application of the General Assembly's resolution after the entry into force of the Federal Act and the Constitution of Eritrea the Panel expressed the following view : It is true that once the Federal Act and the Eritrean Constitution have come into force the mission entrusted to the General Assembly under the Peace Treaty with Italy will have been fulfilled and the future of Eritrea must be regarded as settled ; but it does not follow that the United Nations will no longer have any right to deal with the question of Eritrea. The Federal Act and the Eritrean Constitution will still be based on the resolution of the United Nations and that international instrument will retain its full force. That being so, if it were necessary either to amend or to interpret the Federal Act, **only the General Assembly, as the author of that instrument, would be competent** to take a decision. Similarly, if the Federal Act were violated, the General Assembly could be seized of the matter."

With this we may compare the Commissioner's own observation in reviewing the obligations of the Eritrean Government to respect human rights (do. p. 52) :—

> "If the Federal Government should fail to provide the guarantees prescribed in paragraph 7, the Federation may be held internationally responsible."

What is the answer to this question ?

In the course of informal discussions with competent authorities the writer gathered that the reply by the Ethiopian Government would simply be that it was not within the competence of the General Assembly to impose in perpetuity on the people of any country the obligation to maintain a system of government contrary to their wishes. Presumably, it would also add, that any judgment as to the reality or manner of such expression was a matter within the sole competence of the federal government itself.

More basically we are faced by the question of the nature and source of the authority of the United Nations, whose power

to act in the establishment of the Federation was fundamentally no more than that implied in the request of the Four Powers to make a "recommendation".

While in fact the United Nations, through its Commissioner, assumed the initiative in taking "appropriate measures" for carrying into effect its own recommendations, it presumably did so as the agent of the Four Powers—a body at that time all-powerful as the military victors in a war but now presumably *'functus offico'*.

ERITREA
ETHIOPIA

Documents

CONTENTS

RESOLUTION
OF THE GENERAL ASSEMBLY
OF THE UNITED NATIONS

December 2, 1950

Eritrea : Report of the United Nations Commission for Eritrea ; Report of the Interim Committee of the General Assembly on the Report of the United Nations Commission for Eritrea.

Whereas by paragraph 3 of Annex XI to the Treaty of Peace with Italy, 1947, the Powers concerned have agreed to accept the recommendation of the General Assembly on the disposal of the former Italian colonies in Africa and to take appropriate measures for giving effect to it,

Whereas by paragraph 2 of the aforesaid Annex XI such disposal is to be made in the light of the wishes and welfare of the inhabitants and the interests of peace and security, taking into consideration the views of interested governments,

Now therefore

The General Assembly, in the light of the reports of the United Nations Commission for Eritrea and of the Interim Committee, and

Taking into consideration

(*a*) The wishes and welfare of the inhabitants of Eritrea, including the views of the various racial, religious and political groups of the provinces of the territory and the capacity of the people for self-government,

(*b*) The interests of peace and security in East Africa,

(*c*) The rights and claims of Ethiopia based on geographical, historical, ethnic or economic reason, including in particular Ethiopia's legitimate need for adequate access to the sea,

Taking into account the importance of assuring the continuing collaboration of the foreign communities in the economic development of Eritrea,

Recognizing that the disposal of Eritrea should be based on its close political and economic association with Ethiopia, and

Desiring that this association assure to the inhabitants of Eritrea the fullest respect and safeguards for their institutions, traditions, religions and languages, as well as the widest possible measure of self-government, while at the same time respecting the Constitution, institutions, traditions and the international status and identity of the Empire of Ethiopia.

A. *Recommends that :*

1. Eritrea shall constitute an autonomous unit beferated with Ethiopia under the sovereignty of the Ethiopian Crown.

2. The Eritrean Government shall possess legislative, executive and judicial powers in the field of domestic affairs.

3. The jurisdiction of the Federal Government shall extend to the following matters ; defence, foreign affairs, currency and finance, foreign and interstate commerce and external and interstate communications, including ports. The Federal Government shall have the power to maintain the integrity of the Federation and shall have the right to impose uniform taxes, throughout the Federation to meet the expenses of federal functions and services, it being understood that the assessment and the collection of such taxes in Eritrea are to be delegated to the Eritrean Government, and provided that Eritrea shall bear only its just and equitable share of these expenses. The jurisdiction of the Eritrean Government shall extend to all matters not vested in the Federal Government, including the power to maintain the internal police, to levy taxes to meet the expenses of domestic functions and services, and to adopt its own budget.

4. The area of the Federation shall constitute a single area for customs purposes, and there shall be no barriers to the free movement of goods and persons within the area. Customs duties on goods entering or leaving the Federation which have their final destination or origin in Eritrea shall be assigned to Eritrea.

5. An Imperial Federal Council composed of equal numbers of Ethiopian and Eritrean representatives shall meet once a year and shall advise upon the common affairs of the Federation referred to in paragraph 3 above. The citizens of Eritrea shall participate in the executive and judicial branches, and shall be represented in the legislative branch, of the Federal

Government, in accordance with law and in the proportion that the population of Eritrea bears to the population of the Federation.

6. A single nationality shall prevail through the Federation.

7. (*a*) All inhabitants of Eritrea, except persons possessing foreign nationality, shall be nationals of the Federation ;

(*b*) All inhabitants born in Eritrea and having at least one indigenous parent or grandparent shall also be nationals of the Federation. Such persons, if in possession of a foreign naitonality, shall within six months of the coming into force of the Eritrean Constitution, be free to opt to renounce the nationality of the Federation and retain such foreign nationality. In the event that they do not so opt, they shall thereupon lose such foreign nationality ;

(*c*) The qualifications of persons acquiring the nationality of the Federation under sub-paragraphs (*a*) and (*b*) above for exercising their rights as citizens of Eritrea shall be determined by the Constitution and laws of Eritrea ;

(*d*) All persons possessing foreign nationality who have resided in Eritrea for ten years prior to the date of the adoption of the present resolution shall have the right, without further requirements of residence, to apply for the nationality of the Federation in accordance with federal laws. Such persons who do not thus acquire the nationality of the Federation shall be permitted to reside in and engage in peaceful and lawful pursuits in Eritrea :

The rights and interests of foreign nationals resident in Eritrea shall be guaranteed in accordance with the provisions of paragraph 7.

7. The Federal Government, as well as Eritrea, shall ensure to residents in Eritrea, without distinction of nationality, race, sex, language or religion, the enjoyment of human rights and fundamental liberties, including the following :

(*a*) The right to equality before the law. No discrimination shall be made against foreign enterprises in existence in Eritrea engaged in industrial, commercial, agricultural, artisan,

educational or charitable activities, nor against banking institutions and insurance companies operating in Eritrea ;

(*b*) The right to life, liberty and security of person ;

(*c*) The right to own and dispose of property. No one shall be deprived of property, including contractual rights, without due process of law and without payment of just and effective compensation ;

(*d*) The right to freedom of opinion and expression and the right of adopting and practising any creed or religion ;

(*e*) The right to education ;

(*f*) The right to freedom of peaceful assembly and association ;

(*g*) The right to inviolability of correspondence and domicile, subject to the requirements of the law ;

(*h*) The right to exercise any profession subject to the requirements of the law ;

(*i*) No one shall be subject to arrest or detention without an order of a competent authority, except in case of flagrant and serious violation of the law in force. No one shall be deported except in accordance with the law ;

(*j*) The right to a fair and equitable trial, the right of petition to the Emperor and the right of appeal to the Emperor for commutation of death sentences ;

(*k*) Retroactivity of penal law shall be excluded ;

The respect for the rights and freedoms of others and the requirements of public order and the general welfare along will justify any limitations to the above rights.

8. Paragraphs 1 to 7 inclusive of the present resolution shall constitute the Federal Act which shall be submitted to the Emperor of Ethiopia for ratification.

9. There shall be a transition period which shall not extent beyond 15 September 1952, during which the Eritrean Government will be organized and the Eritrean Constitution prepared and put into effect.

10. There shall be a United Nations Commissioner in Eritrea appointed by the General Assembly. The Commissioner

will be assisted by experts appointed by the Secretary-General of the United Nations.

11. During the transition period, the present Administering Authority shall continue to conduct the affairs of Eritrea. It shall, in consultation with the United Nations Commissioner, prepare as rapidly as possible the organization of an Eritrean administration, induct Eritreans into all levels of the administration, and make arrangements for and convoke a representative assembly of Eritreans chosen by the people. It may, in agreement with the Commissioner, negotiate on behalf of the Eritreans a temporary customs union with Ethiopia to be put into effect as soon as practicable.

12. The United Nations Commissioner shall, in consultation with the Administering Authority, the Government of Ethiopia, and the inhabitants of Eritrea, prepare a draft of the Eritrean Constitution to be sumbitted to the Eritrean Assembly and shall advise and assist the Eritrean Assembly in its consideration of the Constitution. The Constitution of Eritrea shall be based on the principles of democratic government, shall include the guarantees contained in paragraph 7 of the Federal Act, shall be consistent with the provisions of the Federal Act and shall contain provisions adopting and ratifying the Federal Act on behalf of the people of Eritrea.

13. The Federal Act and the Constitution of Eritrea shall enter into effect following ratification of the Federal Act by the Emperor of Ethiopia, and following approval by the Commissioner, adoption by the Eritrean Assembly and ratification by the Emperor of Ethiopia of the Eritrean Constitution.

14. Arrangements shall be made by the Government of the United Kingdom of Great Britain and Northern Ireland as the Administering Authority for the transfer of power to the appropriate authorities. The transfer of power shall take place as soon as the Eritrean Constitution and the Federal Act enter into effect, in accordance with the provisions of paragraph 13 above.

15. The United Nations Commissioner shall maintain his headquarters in Eritrea until the transfer of power has been

completed, and shall make appropriate reports to the General Assembly of the United Nations concerning the discharge of his functions. The Commissioner may consult with the Interim Committee of the General Assembly with respect to the discharge of his functions in the light of developments and within the terms of the present resolution. When the transfer of authority has been completed, he shall so report to the General Assembly and submit to it the text of the Eritrean Constitution ;

B. *Authorizes the Secretary-General, in accordance with established practice :*

1. To arrange for the payment of an appropriate remuneration to the United Nations Commissioner ;

2. To provide the United Nations Commissioner with such experts, staff and facilities as the Secretary-General may consider necessary to carry out the terms of the present resolution.

CONSTITUTION OF ERITREA

As adopted by the Eritrean Assembly on 10 July, 1952.

PREAMBLE

In the name of Almighty God,

Trusting that He may grant Eritrea peace, concord and prosperity.

And that the Federation of Eritrea and Ethiopia may be harmonious and fruitful,

We, the Eritrean Assembly, acting on behalf of the Eritrean people,

Grateful to the United Nations for recommending that Eritrea shall constitute an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown and that its Constitution be based on the principles of democratic government,

Desirous of satisfying the wishes and ensuring the welfare of the inhabitants of Eritrea by close and economic association with Ethiopia and by respecting the rights and safeguarding the institutions, traditions, religions and languages of all the elements of the population.

Resolved to prevent any discrimination and to ensure, under a régime of freedom and equality, the brotherly collaboration of the various races and religions in Eritrea, and to promote economic and social progress,

Trusting fully in God, the Master of the Universe.

Do hereby adopt this Constitution as the Constitution of Eritrea.

PART I

GENERAL

Article 1.

Adoption and ratification of the Federal Act

1. The Eritrean people, through their representatives, hereby adopt and ratify the Federal Act approved on 2 December 1950 by the General Assembly of the United Nations.

2. They undertake to observe faithfully the provisions of the said Act.

CHAPTER I

Status of Eritrea

Article 2.

Territory of Eritrea

The territory of Eritrea, including the islands, is that of the former Italian colony of Eritrea.

Article 3.

Autonomy and Federation

Eritrea shall constitute an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown.

Article 4.

Legislative, Executive and Judicial Powers

The Government of Eritrea shall exercise legislative, executive and judicial powers with respect to matters within its jurisdiction.

Article 5

Matters coming within the jurisdiction of Eritrea

1. The jurisdiction of the Government of Eritrea shall extend to all matters not vested in the Federal Government by the Federal Act.

2. This jurisdiction shall include :

(*a*) The various branches of law (criminal law, civil law, commercial law, etc.) ;
(*b*) The organization of the public services ;
(*c*) Internal police ;
(*d*) Health ;
(*e*) Education ;
(*f*) Public assistance and social security ;

(*g*) Protection of labour ;
(*h*) Exploitation of natual resources and regulation of industry, internal commerce, trades and professions ;
(*i*) Agriculture ;
(*j*) Internal communications ;
(*k*) The public utility services which are peculiar to Eritrea.
(*l*) The Eritrean budget and the establishment and collection of taxes designed to meet the expenses of Eritrean public functions and services.

Article 6

Contribution by Eritrea to the expenses of the Federal Government

1. Eritrea shall bear its just and equitable share of the expenses of Federal functions and services.

Assessment and levying of Federal taxes

2. The Government of Eritrea shall assess and levy in Eritrea, by delegation from the Federal Government, such taxes as are established to that end for the benefit of the whole of the Federation.

Revenue from customs duties

3. Within the revenue which accrues to Eritrea shall be included the customs duties on goods entering or leaving the Federation which have their final destination or origin in Eritrea, in accordance with the provisions of paragraph 4 of the resolution of 2 December 1950 of the General Assembly of the United Nations.

Article 7

Representation of Eritrea in the Imperial Federal Council

1. The Eritrean representatives in the Imperial Federal Council, composed of equal numbers of Ethiopians and Eritreans shall be appointed by the Chief Executive with the approval of the Assembly. They shall be formally invested in office by the Emperor.

Participation of Eritreans in the Federal Government

2. Eritreans shall participate in the executive and judicial branches and shall be represented in the legislative branch of the Federal Government, in accordance with law and in the proportion that the population of Eritrea bears to the population of the Federation.

Article 8

Eritrean citizenship

Persons who have acquired Federal nationality in Eritrea under the Federal Act (Section A, paragraph 6 of the General Assembly Resolution 390 A (V)) and have been granted Eritrean citizenship in accordance with the laws of Eritrea shall be citizens of Eritrea.

Article 9

Rights of Federal nationals who are not Eritrean citizens

1. On the basis of reciprocity, Federal nationals who are not Eritrean citizens shall enjoy the same rights as Eritreans.

2. Federal nationals shall enjoy political rights in accordance with the Eritrean Constitution and laws on the basis of reciprocity.

CHAPTER II

Representation of the Emperor in Eritrea

Article 10

The Emperor has a representative in Eritrea

There shall be a representative in Eritrea of His Imperial Majesty, the Emperor of Ethiopia, Sovereign of the Federation.

Article 11

Rank of the Representative of the Emperor

The Representative of the Emperor shall, on all occasions, have the place of precedence at official ceremonies in Eritrea.

Article 12

Administering of the oath of office to the Chief Executive before the Representative of the Emperor. Formal investment of the Chief Executive in office.

The Chief Executive, elected by the Assembly in accordance with Article 58, shall take the oath of office in accordance with the provisions of Article 72. The Representative of the Emperor having noted that the Chief Executive has been elected by the Assembly, shall formally invest him in office in the name of the Emperor, Sovereign of the Federation.

Article 13

Opening and closing of sessions of the Assembly.

At the opening and closing of sessions of the Assembly, the Representative of the Emperor may deliver the speech from the throne in which he will deal with affairs of common interest to the Federation and to Eritrea.

Article 14

Transmission of legislation to the representative of the Emperor.

1. When draft legislation has been voted by the Assembly, the Chief Executive will transmit it immediately to the Representative of the Emperor.

2. If the Representative of the Emperor considers that draft legislation voted by the Assembly encroaches upon Federal jurisdiction, or that it involves the internal responsibility of the Federation, he may transmit a request to the Chief Executive within twenty days after the vote by the Assembly for reconsideration of the draft legislation by the Assembly, indicating his reasons for doing so.

Article 15

Promulgation of legislation

The Representative of the Emperor will promulgate legislation in the manner laid down in Article 58.

Article 16

The principles of democratic government

The Constitution of Eritrea is based on the principles of democratic government.

Article 17

Respect for human rights

The Constitution guarantees to all persons the enjoyment of human rights and fundamental freedoms.

Article 18

Organs of government are provided for by the people and shall act in the interests of the people.

1. All organs of government are provided for by the people. They are chosen by means of periodic, free and fair elections, directly and indirectly.

2. The organs of government shall act in the interests of the people.

Article 19

Rule of law

1. The organs of government and public officials shall have no further powers than those conferred on them by the Constitution and by the laws and regulations which give effect thereto.

2. Neither a group of the people nor an individual shall arbitrarily assume the exercise of any political power or of administrative functions.

3. Public officials shall perform their duties in strict conformity with the law and solely in the public interest.

4. Public officials shall be personally answerable for any unlawful acts or abuses they may commit.

Article 20

Franchise

The electorate shall consist of those persons possessing Eritrean citizenship who :

(*a*) Are of male sex ;
(*b*) Have attained the age of twenty-one years ;

(*c*) Are under no legal disability as defined by the law, and

(*d*) Have been resident for one year preceding the election in the constituency where they shall vote.

Article 21

Flag, seal and arms of Eritrea
Federal flag

1. The Federal flag shall be respected in Eritrea.

2. There shall be a flag, seal and arms of Eritrea, details of which shall be decided upon by law.

CHAPTER IV

Human Rights and Fundamental Freedoms

SECTION I

PROVISIONS REPRODUCED FROM THE FEDERAL ACT

Article 22

Provisions reproduced from the Federal Act

The following provisions of paragraph 7 of the Federal Act shall be an integral part of the Constitution of Eritrea :

"The Federal Government, as well as Eritrea, shall ensure to residents in Eritrea, without distinction of nationality, race, sex, language or religion, the enjoyment of human rights and fundamental liberties, including the following :

"(*a*) The right to equality before the law. No discrimination shall be made against foreign enterprises in existence in Eritrea engaged in industrial, commercial, agricultural, artisan, educational or charitable activities nor against banking institutions and insurance companies operating in Eritrea ;

(*b*) The right to life, liberty and security of person ;

(*c*) The right to own and dispose of property. No one shall be deprived of property, including contractual rights, without due process of law and without payment of just and effective compensation ;

(*d*) The right to freedom of opinion and expression and the right of adopting and practising any creed or religion ;

(*e*) The right to education ;

(*f*) The right to freedom of peaceful assembly and association ;

(*g*) The right to inviolability of correspondence and domicile subject to the requirements of the law ;

(*h*) The right to exercise any profession subject to the requirements of the law ;

(*i*) No one shall be subject to arrest or detention without an order of a competent authority, except in case of flagrant and serious violation of the law in force. No one shall be deported except in accordance with the law ;

(*j*) The right to a fair and equitable trial, the right of petition to the Emperor and the right of appeal to the Emperor for commutation of death sentences ;

(*k*) Retroactivity of penal law shall be excluded."

SECTION II

OTHER PROVISIONS

Article 23

Freedom and equality before the law. Everyone is a person before the law.

All persons are born free and are equal before the law without distinction of nationality, race, sex or religion and, as such shall enjoy civil rights and shall be subject to duties and obligations.

Article 24

Prohibition of torture and certain punishments

No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

Article 25

Right to freedom of movement

Everyone resident in Eritrea has the right to freedom of movement and to the choice of place of residence in Eritrea subject to the provisions of Article 34.

Article 26

Freedom of conscience and religion

The right to freedom of conscience and religion shall include the right of everyone, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 27

No discrimination to the detriment of any religion

No economic, financial or political measure of a discriminatory nature shall be taken to the detriment of any religion practised in Eritrea.

Article 28

Recognition of religious bodies as Persons before the law

Religious bodies of all kinds and religious orders shall be recognized as possessing juristic personality.

Consequently, any religious denomination or any group of citizens belonging to such denomination shall be entitled :—

(*a*) To establish and maintain institutions for religious, educational and charitable purposes ;

(*b*) To conduct its own affairs in matters of religion ;

(*c*) To possess and acquire movable and immovable property ;

(*d*) To administer its property and to enter into contracts.

Article 29

Religious instruction and worship in public schools

No pupil attending a public school shall be required to take part in any religious instruction at such school or attend any religious service at such school.

Article 30

Freedom to express opinions

Everyone resident in Eritrea shall have the right to express his opinion through any medium whatever (Press, speech, etc.) and to learn the opinions expressed by others.

Article 31

Right to education and freedom to teach.

1. Everyone resident in Eritrea shall have the right to education. The Government shall make every effort to establish schools and to train teachers.

2. The Government shall encourage private persons and private associations and institutions, regardless of race, nationality, religion, sex or language, to open schools, provided that they give proof of the required standards of morality and competence.

3. The instruction in the schools shall conform to the spirit of the Constitution.

Article 32

Associations and companies

1. Everyone resident in Eritrea shall have the right to form associations or companies for lawful purposes.

2. Companies or associations shall enjoy fundamental freedoms in so far as their nature permits.

3. Such companies or associations shall be regarded as persons before the law.

Article 33

Protection of working conditions

1. Everyone resident in Eritrea, regardless of nationality, race, sex, or religion, shall have the right to opportunity of work, to equal pay for equal work, to regular holidays with pay, to payment of dependency allowances, to compensation for illness and accidents incurred through work and to a decent and healthy standard of life.

Trade Unions

2. Everyone resident in Eritrea shall have the right to form and join trade unions for the protection of his interests.

Article 34

Control by law of the enjoyment of human rights and fundamental freedoms

1. The provisions in the last sub-paragraph of paragraph 7 of the Federal Act apply to the whole of Chapter IV of Part I of the Constitution. This sub-paragraph reads as follows :—

> "The respect for the rights and freedoms of others and the requirements of public order and the general welfare alone will justify any limitations to the above rights."

2. In applying the aforementioned provisions, the enjoyment of human rights and fundamental freedoms may be regulated by law provided that such regulation does not impede their normal enjoyment.

Article 35

Duties of individuals

Everyone shall have the duty to respect the Constitution and the laws, and to serve the community.

CHAPTER V

Special Rights of the Various Population Groups in Eritrea

Article 36

Personal status

Nationals of the Federation, including those covered by sub-paragraphs (*b*) and (*d*) of paragraph 6 of the Federal Act, as well as foreign nationals, shall have the right to respect for their customs and their own legislation governing personal status and legal capacity, the law of the family and the law of succession.

Article 37

Property rights

Property rights and rights of real nature, including those on State lands, established by custom or law and exercised in Eritrea by the tribes, the various population groups and by natural or legal persons, shall not be impaired by any law of a discriminatory nature.

Article 38

Languages

1. Tigrinya and Arabic shall be the official languages of Eritrea.

2. In accordance with established practice in Eritrea, the language spoken and written by the various population groups shall be permitted to be used in dealing with the public authorities, as well as for religious or educational purposes and for all forms of expression of ideas.

PART II

THE ASSEMBLY

CHAPTER I

Composition and Election of the Assembly

Article 39

Creation of an Assembly representing the Eritrean people

1. Legislative power shall be exercised by an Assembly representing the Eritrean people.

2. Members of the Assembly shall represent the Eritrean people as a whole, and not only the constituency in which they are elected.

Article 40

Number of members of the Assembly

1. The Assembly shall be composed of not less than fifty and not more than seventy members.

2. Within the limits prescribed in the preceding paragraph, the number of members shall be fixed by law.

Article 41

Constituencies

1. The territory of Eritrea shall be divided into electoral constituencies, each electing one representative.

2. These constituencies shall be established in such a way that they will be approximately equal in population. The boundaries of the constituencies shall be fixed by law.

Article 42

Eligibility

All members of the electorate shall be eligible for election to the Assembly provided that :

(*a*) They have reached the age of thirty ;

(*b*) They have been resident in Eritrea for three years and have been resided in the constituency for two years during the last ten years ;

(*c*) They are not disqualified for any reason laid down by law ; and

(*d*) They are not officials of the Eritrean or Federal Governments, unless they have resigned at the time of presenting their candidature.

Article 43

The two voting system

1. The members of the Assembly shall be elected either by direct or indirect ballot.

2. The system of voting to be used in any given constituency shall be laid down by law.

3. Voting by direct ballot shall be personal, equal and secret.

For this purpose, a roll of qualified voters shall be drawn up, and revised from time to time.

The system for establishing electoral rolls shall be fixed by law.

4. The first stage of voting by indirect ballot shall be conducted in accordance with local custom. At the second stage voting shall be personal, equal and secret.

Article 44

Election by direct ballot and election at second stage in the case of indirect ballot.

1. If a candidate for the Assembly obtains an absolute majority of the votes cast he shall be declared elected.

2. If no candidate obtains an absolute majority, as defined in paragraph 1, a second ballot shall be held, and the candidate who then obtains the greatest number of votes shall be declared elected.

Article 45

Electoral High Commission

1. An electoral High Commission consisting of three persons appointed by the Supreme Court established under Article 85 shall be responsible for supervising all electoral proceedings (including the compiling of electoral rolls), and for preventing or putting a stop to irregularities.

2. The High Commission shall appoint in each constituency, from among the electors of that constituency, a representative to act under its authority.

3. The said representative shall be assisted by an advisory election committee, consisting of members chosen by him from among the electors of that constituency.

As soon as an election period has been declared open in accordance with the law every candidate shall be entitled to be represented on the committee.

4. The implementation of the present article shall be prescribed by law.

Article 46

Disputed elections to the Assembly

1. At the opening of the session following an election, the Assembly shall confirm its members. All members whose elections are unchallenged shall be confirmed simultaneously.

2. In any case where an election is challenged, the Assembly shall decide, by a two-thirds majority of the members present, whether the challenged election is valid, provided that such two-thirds majority shall be not less than one half of the members of the Assembly in office.

3. In the event of a member's election not being confirmed he may, within three days following the adoption of the decision by the Assembly, appeal to the Supreme Court established under Article 85, but shall not take his seat until the Supreme Court has given its decision.

Article 47

Term of the Assembly

1. The Assembly shall be elected for a term of four years

2. Members shall be eligible for re-election.

3. If there is a vacancy during the term of an Assembly, a by-election shall take place. No by-election can, however, take place within six months of the election of a new Assembly.

CHAPTER II

Sessions and Meetings

Article 48

Regular sessions

1. The Assembly shall hold two regular sessions each year

2. The Assembly shall meet in regular session on a date to be specified by law.

This session shall continue for at least one month.

3. The opening date of the second regular session shall be fixed by the Chief Executive after consulting the President of the Assembly.

This second session shall be devoted primarily to voting the budget and the Assembly shall consider no other matter until the budget has been voted. The session shall not close until the budget has been voted as prescribed in Article 60.

4. The closing date of regular sessions shall be fixed by the Chief Executive after consulting the President of the Assembly.

5. With the consent of the President of the Assembly, the Chief Executive may suspend a session for a period not exceeding twenty days.

Article 49

Special sessions

1. The Chief Executive may convene the Assembly to a special session.

2. The Chief Executive shall convene the Assembly to a special session whenever a written request is submitted by not less than one-third of the members.

3. When the Assembly is convened to a special session by the Chief Executive on his own initiative, only the questions set forth in the notice convening the Assembly shall be discussed. The Chief Executive shall fix the closing date of the session.

5. When the Assembly is convened to a special session at the request of not less than one-third of its members, it shall determine its own agenda. The Chief Executive shall fix the closing date of the session in agreement with the President of the Assembly.

Article 50

Quorum

Two thirds of the members of the Assembly shall compose a quorum.

Article 51

Rules of procedure

The Assembly shall adopt its own rules of procedure.

Article 52

Officers of the Assembly

The Assembly shall elect its officers at the opening of the first regular session of each year or at the beginning of a new Legislature. The officers shall consist of a President, a Vice-president and, if the Assembly so desires, other officers.

CHAPTER III

Status of Members of the Assembly

Article 53

Swearing-in of members

Before taking up their duties, members of the Assembly who have not served in the previous Legislature shall take, in accordance with the faith and the customary practice of the individual concerned, the following oath before the President of the Assembly :

> "I undertake before Almighty" (or an invocation conforming to the faith and the customary practice of the member of the Assembly concerned) "to respect the Federation under the sovereignty of the Imperial Crown, loyally to serve Eritrea, to defend its Constitution and its laws, to seek no personal advantage from my office, and to perform all my duties conscientiously."

Article 54

Parliamentary immunity

1. Members of the Assembly shall not be liable to prosecution for opinions expressed or votes cast by them in the performances of their duties.

2. Members of the Assembly shall not be arrested or Prosecuted without the authorization of the Assembly ; save that in case of flagrant delict they may be arrested, but the prosecution, even in this case, shall be authorized by the Assembly.

When the Assembly is not in session, such authorization may be given by its officers. The Assembly may subsequently decide that proceedings shall be discontinued.

Article 55

Remuneration of members of the Assembly

1. Members of the Assembly shall receive a remuneration fixed by law.

2. No increase of remuneration shall take effect until the term of office of the Assembly voting it has expired.

CHAPTER IV

Powers of the Assembly

Article 56

General powers of the Assembly

The Assembly shall vote the laws and the budget, elect the Chief Executive and supervise the activities of the Executive.

SECTION I.

LEGISLATIVE FUNCTIONS

Article 57

Drafting and adoption of legislation

1. Draft legislation may be introduced into the Assembly by members of the Assembly or submitted to the Assembly by the Chief Executive.

2. Such legislation shall be considered, discussed and put to the vote as provided in the Assembly's rules of procedure.

Article 58

Request for a reconsideration

1. Draft legislation adopted by the Assembly shall be immediately transmitted by the President of the Assembly to the Chief Executive.

Approval of legislation by the Chief Executive

2. The Chief Executive will transmit it as soon as received to the Representative of the Emperor who may request, in accordance with the provisions of Article 14, that it be reconsidered by the Assembly.

Publication

3. If the Representative of the Emperor, exercising the prerogatives for which provision is made under Article 14, has

transmitted a request to the Chief Executive for reconsideration, giving his reasons for doing so, the Assembly must take a further vote. The draft legislation must obtain a two-thirds majority vote to be adopted.

4. If the draft legislation has been adopted after reconsideration, as provided in the preceding paragraph, or if the Representative of the Emperor has not exercised his prerogatives under Article 14, the Chief Executive must within twenty days after the vote taken by the Assembly, either approve the draft legislation and transmit it to the Representative of the Emperor for promulgation within five days of its receipt, or return it to the Assembly with his comments.

5. If the Chief Executive shall have returned the draft legislation to the Assembly, the Assembly shall reconsider the draft legislation and take a further vote on it. If the draft legislation is then adopted by a two-thirds majority, the Chief Executive shall transmit it to the Representative of the Emperor for promulgation within five days of its receipt.

6. All draft legislation adopted in accordance with the provisions of this article but not promulgated within the time limit laid down in paragraph 4 and 5 of this Article, shall come into effect after publication by the Chief Executive.

SECTION II

BUDGET

Article 59

Submission of the draft budget by the Chief Executive

1. At least one month before the opening of the second regular session of the Assembly, the Chief Executive shall submit a draft budget for the next financial year.

2. The draft budget shall cover the whole of the revenue and expenditures of the Government of Eritrea for the next financial year.

Article 60

Examination and adoption of the budget by the Assembly

1. During the month preceding the second regular session of the Assembly, the Assembly Finance Committee shall examine the draft budget submitted by the Executive and report to the Assembly.

2. A general debate on the draft budget shall be held at the beginning of the second regular session of the Assembly.

Within ten days following the closure of the debate, the Executive shall submit a revised draft budget including the amendments it may decide to make to its first draft as a result of the observations made by the Assembly.

3. The Assembly shall then proceed to examine the various items of the budget :

(*a*) It shall first adopt the expenditure estimates, with or without amendments, only the total estimate for each Executive Department being put to the vote.

The Assembly may not increase the estimates proposed in the draft budget unless increase is balanced by corresponding .estimates of revenue and has received the consent of the Executive.

(*b*) The Assembly shall then adopt, with or without amendments, the revenue estimates chapter by chapter, each of which shall be put to the vote separately.

4. The complete budget shall be adopted before the beginning of the financial year ; otherwise, the amended draft budget submitted by the Executive as provided in paragraph 2 above shall be deemed to be adopted, provided the Executive has itself observed the time-limit laid down in Article 59 and in the present article.

Article 61

All taxation and expenditure must be authorised by law

No tax shall be levied and no expenditure shall be incurred unless authorised by law.

Article 62

Form of the budget

A law shall be enacted governing the form in which the budget is to be submitted and voted on each year.

Article 63

Credit for urgent expenditure

1. When voting the budget, the Assembly shall include a credit for urgent expenditure.

2. The amount of this credit shall not exceed 10 per cent of the expenditure estimates.

3. At the beginning of the following session of the Assembly, the Chief Executive shall report on the use he has made of this credit. The Assembly shall take a vote on this report.

Article 64

Accounts for past financial years

1. Within eighteen months following the close of each financial year, the Executive shall submit the accounts for that financial year to the Assembly for approval.

2. An Auditor-General, independent of the Executive, shall be elected by the Assembly.

3. The principal function of the Auditor-General shall be to examine the annual accounts, and to make a report to the Assembly containing his observations on them at the time of their presentation to the Assembly.

4. The method of election and the matters within the competence of the Auditor-General shall be established by law.

SECTION III

ELECTION AND SUPERVISION OF THE EXECUTIVE

Article 65

Election of the Chief Executive

The Assembly shall elect the Chief Executive as provided in Article 68.

Article 66

Supervision of the Executive by the Assembly

1. Members of the Assembly may submit questions in writing or short questions orally to the Executive which shall reply.

2. At the request of ten members of the Assembly, a debate may be held on the Executive's policy.

The Executive shall be entitled to intervene both in the course of the debate and before its closure.

PART III

THE EXECUTIVE

CHAPTER I

Composition and Appointment

Article 67

Composition of the Executive

The Executive shall consist of a Chief Executive assisted by Secretaries of Executive Departments.

Article 68

Election of the Chief Executive

1. The Chief Executive shall be elected by the Assembly by secret ballot ; if a candidate obtains two thirds of the votes

cast he shall be declared elected. If no candidate obtains the requisite number of votes the candidate receiving the least number of votes shall be removed from the list and the Assembly shall vote again on the remainder repeating the process if necessary until a candidate obtains the required of votes.

2. Only Eritrean citizens having attained the age of thirty-five years and in possession of their political rights shall be eligible for the office of the Chief Executive.

3. The Assembly shall elect a Chief Executive at the opening of each new legislature.

4. In case of death or resignation of the Chief Executive, the Assembly shall elect a successor within fifteen days. If the Assembly is not in session, the President of the Assembly shall convene it to a special session.

5. The newly elected Chief Executive shall remain in office until the expiry of his predecessor's term.

6. The Chief Executive shall be eligible for re-election.

Article 69

Appointment of Secretaries of Executive Departments

1. The Chief Executive shall have power to appoint and dismiss Secretaries of Executive Departments, who shall be responsible to him.

2. Only persons qualified to be members of the Eritrean electorate shall be eligible to hold office as Secretaries of Executive Departments.

3. The Chief Executive shall select the Secretaries of Executive Department in such a way as to ensure as far as possible a fair representation in his council of the principal groups of the population and the various geographical areas of the territory.

4. The number and the functions of Secretaries of Executive Departments shall be prescribed by law.

Article 70

Incompatibility

The office of the Chief Executive or of Secretary of an Executive Department is incompatible with the holding of any other administrative or judicial office.

Article 71

Acting Chief Executive

The Chief Executive, on being elected, shall designate one of the Secretaries of Executive Departments to act for him if he is temporarily prevented from discharging his duties, or if his post fall vacant, until such time as a new Chief Executive is elected.

Article 72

Swearing-in of the Chief Executive

Before taking up his duties, the Chief Executive shall, according to his faith and customary practice, take the following oath in the Assembly before the Representative of the Emperor :

> "I undertake before Almighty God" (or a invocation conforming to the faith and the customary practice of the Chief Executive) "to respect the Federation under the sovereignty of the Imperial Crown, loyally to serve Eritrea, to defend its Constitution and its laws, to seek the welfare of the Eritrean people in the unity of its inhabitants bound together by ties of brotherhood, whatever their race, religion or language, and to seek no personal advantage from my office."

Article 73

Swearing-in of Secretaries of Executive Departments

Before taking up their duties, Secretaries of Executive Departments shall, according to their faith and their customary practices, take the following oath publicly in the Assembly before the Representative of the Emperor :

"I undertake before Almighty God" (or an invocation conforming to the faith and customary practice of the individual concerned) "loyally to respect the Federation under the sovereignty of the Imperial Crown, loyally to serve Eritrea, to respect its Constitution and its laws, to seek no personal advantage from my office and to perform all my duties conscientiously."

Article 74

Council of the Executive

The Chief Executive shall from time to time summon a council of the Secretaries of Executive Departments. This Council shall advise the Chief Executive on matters of general policy and on any questions he may submit to it.

Article 75

Removal from office of the Chief Executive

1. The Chief Executive shall not be answerable for any act performed by him in the course of his duties except for a grave violation of the Constitution. He shall be answerable for failure to dismiss any Secretary of an Executive Department committing a grave violation of the Constitution.

2. In such circumstances, the Chief Executive may be impeached by a two-thirds majority of the members of the Assembly in office, and tried by the Supreme Court established under Article 85.

3. If the Supreme Court finds the charge to be proved, it shall order the removal from office of the Chief Executive. It may, furthermore, disqualify him from performing any executive function or legislative duty.

4. Removal from office shall be without prejudice to any proceedings which may be instituted if the acts committed by the Chief Executive constitute offences under criminal law.

CHAPTER II

Powers of the Executive

Article 76

Enumeration of powers

1. The Chief Executive shall ensure that the Constitution and the laws are enforced. He shall have responsibility for the direction of the Executive and Administrative Departments and public services. He shall be Chairman of the Civil Service Commission for which provision is made in Article 82, and shall make appointments in accordance with the Constitution and the laws.

2. He shall be responsible for the internal police of Eritrea and, to this end, he shall issue regulations conforming to the Constitution and the laws to ensure the maintenance of public order and security.

3. He shall convene the sessions of the Assembly as provided in Articles 48 and 49 of the Constitution.

4. Each year, at the opening of the first regular session, he shall give an account to the Assembly of his conduct of affairs and report on the general situation of Eritrea.

5. He shall have the power to propose legislation. He may request the Assembly to reconsider draft legislation. He shall publish the laws after their promulgation or under the provisions of Article 58.

6. He shall submit to the Assembly a draft annual budget and the accounts for the preceding financial year, as provided in Articles 59, 60 and 64.

7. He shall have access to and the right of addressing the Assembly. He may be represented in the Assembly and its Committees by the Secretaries of Executive Departments.

8. He shall issue the regulations required to implement the laws.

9. He shall issue orders as provided in Article 77.

10. He may temporarily limit certain provisions of the Constitution as provided in Article 78.

11. He shall take the necessary measures for the suppression of brigandage, as provided in Article 79.

12. Official documents issued by the Chief Executive must be counter-signed by the Secretaries of the Executive Departments concerned.

Article 77

Power of the Chief Executive to issue orders when the Assembly is not in session

1. In the interval between sessions of the Assembly, the Chief Executive shall have authority to issue, when necessary, orders governing any matter within the jurisdiction of the Government of Eritrea except matters dealt with in Chapter IV of Part I of the Constitution, provided that such orders are compatible with the Constitution and the laws in force.

2. Such orders shall be submitted to the Assembly which must approve or repeal them within a period of two months from the opening of the session following their promulgation.

3. Failing a decision by the Assembly within the abovementioned period, orders by the Chief Executive shall be deemed to be confirmed.

Article 78

Limitation in time of emergency of certain constitutional provisions

1. In the event of a serious emergency which endangers public order and security, the Assembly may, on the proposal of the Chief Executive, adopt a law authorizing him to impose, under the conditions provided for in Article 34, temporary limitations on the rights set forth in Chapter IV of Part I of this Constitution.

2. The authorization thus given by law shall be valid for a maximum period of two months. If necessary, it may be renewed under the same conditions.

3. During the interval between sessions, the Chief Executive may, if it is urgently necessary, issue an order prescribing the measures referred to in paragraph 1.

In such cases, a special session of the Assembly shall be convened, as soon as possible and, at the latest, within twenty days following the promulgation of the order, to adopt a law approving, amending or repealing the said order.

Article 79

Suppression of brigandage

1. If public order and the security of persons and property in Eritrea are threatened by organized brigandage, the Chief Executive shall, after making a proclamation to the people, adopt the exceptional measures necessary to suppress such brigandage.

2. The Chief Executive shall inform the Assembly of the measures he has taken.

CHAPTER III

The Administration

Article 80

Conditions of appointment of officials.

Officials shall be chosen for their ability and character; considerations of race, sex, religion or political opinion shall not influence the choice either to their advantage or to their disadvantage.

Article 81

Status of officials

1. The general status of administrative officials shall be fixed by law.

2. The special status of the various categories of administrative officials shall be fixed by regulations.

Article 82

Civil Service Commission

1. A Civil Service Commission, under the chairmanship of the Chief Executive or his representative, shall be created.

2. This Commission shall be responsible for the appointment, promotion, transfer and discharge of officials, and for taking disciplinary action against them.

3. The composition of this Commission the procedure for the appointment of its members, and the conditions under which it will function will be determined by law.

Article 83

Local communities

1. The Constitution recognizes the existence of local communities.

2. Municipalities shall be accorded the management of their own affairs.

3. Officials responsible for the administration of village and tribal communities shall be selected from persons of those local communities.

4. The conditions for the application of the preceding provisions may be determined by law.

PART IV

THE ADVISORY COUNCIL OF ERITREA

Article 84

Advisory Council of Eritrea

1. An Advisory Council of Eritrea is hereby established.

2. The function of the Council shall be to assist the Chief Executive and the Assembly, with a view to achieving economic and social progress in Eritrea. To this end it may :

(*a*) Draw up plans for the development of the country's resources and for the improvement of public health and hygiene ;

(*b*) Put forward proposals concerning finance and the budget and the organization of the administartion and the public services ;

(*c*) Give advice on draft laws submitted to the Assembly ;

(*d*) On the request of the Chief Executive or of the Assembly, prepare drafts of laws, regulations or orders.

3. The composition and organization of the Council shall be fixed by law.

PART V

THE JUDICIARY

Sole Chapter

Chapter 85

Judicial power

Judicial power shall be exercised by a Supreme Court and by other courts which will apply the various systems of law in force in Eritrea. The organization of these courts shall be established by law.

Article 86

Qualifications required of judges

1. Judges shall be chosen from persons of the highest moral reputation and known to be well versed in the customs and legislation peculiar to the various systems of law which they are required to apply.

Oath

2. Before taking up office, judges shall, according to their faith and their customary practice, take the following oath :

"I swear before Almighty God", (or an invocation conforming to the faith and the customary practice of the judge concerned) "to be a faithful guardian of the law and to administer it impartially and independently in order to ensure that justice shall reign supreme in Eritrea."

Independence of the judiciary

3. The judiciary shall be independent and must be free from all political influence. The Assembly and the Executive shall not give orders or injunctions to the judges, nor shall they bring any pressure to bear on them.

Status of judges

4. The status of judges shall be established by law.

Article 87

Appointment of judges

1. Judges shall be appointed by the Chief Executive on the recommendation of the President of the Assembly who shall be supplied with a list candidates by a Committee composed of the President of the Supreme Court and two judges chosen by the members of the Supreme Court and of the court or courts immediately inferior thereto.

2. The President of the Assembly shall recommended to the Chief Executive two candidates for each appointment.

3. The list of candidates drawn up by the committee provided for in paragraph 1 must include at least three names for each appointment.

Article 88

Responsibility of judges

The Supreme Court provided for in Article 85 shall have jurisdiction in respect of criminal or disciplinary responsibility of judges for acts in connection with the discharge of their duties.

Article 89

Composition of the Supreme Court

1. The Supreme Court shall consist of not less than three and not more than seven judges. On the proposal of the Court, the number of judges may be decreased or increased by law.

2. Judges shall be appointed for a period of seven years, which period may be renewed.

Article 90

Jurisdiction of the Supreme Court

The Supreme Court shall have jurisdiction in the following matters :

(1) As a court of last resort with respect to appeals from final judgements on points of law, and also to the extent provided by law with respect to appeals both on questions of law and fact.

(2) Conflicts of jurisdiction between courts :

In the event of a question involving conflicting jurisdiction, proceedings shall be suspended and the issue shall be presented to the Supreme Court, which shall determine the component jurisdiction.

(3) Disputes concerning the constitutionality of laws and orders.

If the constitutionality of a law or order is challenged before a Court, proceedings shall be suspended and the issue shall be presented to the Supreme Court, which shall decide whether such act is constitutional.

(4) Actions based on administrative acts brought against the Government of Eritrea or other public bodies, unless courts have been established by law to try such cases.

(5) Criminal and disciplinary responsibility of judges as provided in Article 88.

(6) Responsibility of the Chief Executive as provided in Article 75.

PART VI

AMENDMENT OF THE CONSTITUTION

Sole Chapter

Chapter 91

Compliance with the Federal Act and the principles of democratic government

1. The Assembly may not, by means of an amendment, introduce into the Constitution any provision which would not be in conformity with the Federal Act.

2. Article 16 of the Constitution, by the terms of which the Constitution of Eritrea is based on the principles of democratic government, shall not be amended.

Article 92

Amendments to the Constitution

1. Any amendments of the Constitution must be submitted in writing either by the Chief Executive or by a number of members of the Assembly equal to one quarter of the actual number of members.

2. A period of twenty days must elapse between the submission of an amendment and the opening of the Assembly's discussion thereon.

Article 93

Conditions governing the adoption of amendments.

1. If an amendment is approved by a majority of three quarters of the members of the Assembly in office, the amendment shall be declared adopted.

2. If an amendment is approved by two successive legislatures by a majority of two thirds of the members present and voting or by a majority of the members in office, the amendment shall be declared adopted.

Entry into effect of amendments

1. Any amendments to the Constitution adopted by the Assembly according to the provisions of the fore-going paragraphs will enter into effect after ratification by the Emperor, Sovereign of the Federation.

PART VII

TRANSITIONAL PROVISIONS

Article 94

Entry into force of the Constitution

1. This Constitution shall enter into effect following ratification of the Federal Act by the Emperor of Ethiopia, and following approval by the United Nations Commissioner, adoption by the Eritrea Assembly and ratification by the Emperor of Ethiopia of the Eritrean Constitution.

2. The Administering Authority shall continue to conduct the affairs of Eritrea until the transfer of power to the Government of Eritrea has taken place.

Article 95

Laws giving effect to the Constitution

1. Any laws giving effect to the present Constitution, adopted by the Eritrean Assembly convened by the Administering Authority, shall enter into effect simultaneously with the Constitution.

2. Such laws shall conform strictly to the principles and provisions of the Constitution.

Article 96

Legislation remaining into force when the Constitution comes into effect

1. Laws and regulations which were in force on 1 April 1941, and have not since been repealed by the Administering

Authority and the laws and regulations enacted by that Authority shall remain in force so long as they have not been repealed and to the extent that they have not been amended.

2. In the event of conflict between such laws and regulations and this Constitution, the Constitution shall prevail in accordance with Article 90 (3).

Article 97

Respect for obligations contracted on behalf of Eritrea.

1. Obligations of any kind regularly contracted by the authorities administering Eritrea up to the date on which the Constitution enters into force shall remain valid for the Government of Eritrea and must be respected provided that such obligations relate to matters within the jurisdiction of Eritrea.

2. As from the date of the entry into force of the Constitution any undertaking regularly concluded by the Executive Committee established by the Administering Authority before the date of the entry into force of the Constitution shall remain valid and must be respected.

3. The provisions contained in paragraph 1 shall not apply to obligations terminated by the Peace Treaty with Italy of 10 February 1947 or by the Resolution adopted by the United Nations General Assembly on 29 February 1952.

Article 98

Retention of officials in office

Administrative officials and judicial officials whether Federal nationals or not, holding office when the Constitution enters into force, shall continue in office. They may be dismissed only on three month's notice.

Article 99

Term of the first Assembly

The Assembly responsible for adopting the Constitution shall exercise the powers of the Assembly as provided in the Constitution for a period of four years after the Constitution enters into force.

REVISED CONSTITUTION OF ETHIOPIA

AS PROMULGATED BY

HIS IMPERIAL MAJESTY HAILE SELLASSIE I

On the twenty-fourth tekemnt one thousand nine hundred and forty eight (4th November, 1955) on the occasion of twenty-fifth anniversary of his coronation.

PROCLAMATION PROMULGATING THE REVISED CONSTITUTION OF THE EMPIRE OF ETHIOPIA

CONQUERING LION OF THE TRIBE OF JUDAH
HAILE SELLASSIE I
ELECT OF GOD, EMPEROR OF ETHIOPIA

WHEREAS, twenty four years ago, at the beginning of our Reign, We granted to our faithful subjects and proclaimed a Constitution for the Empire of Ethiopia ; and

WHEREAS, ALMIGHTY GOD, THE SOURCE OF BENEFITS, has strengthened and inspired Us to lead Our beloved people, during our Reign, through the greatest of trials and hardship, to an era of great progress in all fields ; and

WHEREAS, being desirous of consolidating the progress achieved and of laying a solid basis for the happiness and prosperity of the present and future generations of Our People, We have prepared a Revised Constitution for Our Empire after many years of searching study and reflection ; and

WHEREAS, Our Parliament, after due examination and deliberation, has submitted to Us its approval of the Revised Constitution ;

NOW THEREFORE, WE, HAILE SELLASSIE I, EMPEROR OF ETHIOPIA, do, on the occasion of the Twenty-fifth Anniversary of Our Coronation, hereby proclaim and place into force and effect as from to-day the Revised Constitution of the

Empire of Ethiopia for the benefit, welfare and progress of Our beloved People.

GIVEN in Our Imperial Capital, on this 24th day of Takemnt, 1948, and on the Twenty-fifth Anniversary of Our Coronation.

CHAPTER I

The Ethiopian Empire and the Succession of the Throne

ARTICLE 1

The Empire of Ethiopia comprises all the territories, including the islands and the territorial waters, under the sovereignty of the Ethiopian Crown. Its sovereignty and territories are indivisible. Its territories and the sovereign rights therein are inalienable.

All Ethiopian subjects, whether living within or out the Empire constitute the Ethiopian People.

ARTICLE 2

The Imperial Dignity shall remain perpetually attached to the line of Haile Sellassie I, descendent of King Sahle Sellassie, whose line descends without interruption from the dynasty of Menelik I, son of the Queen of Ethiopia, the Queen of Sheba, and King Solomon of Jerusalem.

ARTICLE 3

The succession to the Throne and Crown of the Empire by the Descendants of the Emperor and the exercise of the powers of Regency shall be determined as hereinafter provided.

ARTICLE 4

By virtus of His Imperial Blood, as well as by the anointing which He has received, the person of the Emperor is sacred, His dignity is inviolable and His Powers indisputable. He is consequently entitled to all the honours due to Him in accordance with tradition and the present Constitution. Any one so bold as to seek to injure the Emperor will be punished.

ARTICLE 5

The order of succession shall be linear, and only male, born in lawful wedlock, may succeed male ; the nearest line shall pass before the more remote, and the elder in the line before the younger.

In conformity with the provisions of this article and the following articles 6-16, a special law shall determine the order of, and the qualifications for, the succession.

ARTICLE 6

Among those entitled to the succession shall be reckoned also the son unborn, who shall immediately take his proper place in the line of succession the moment he is born into the world.

ARTICLE 7

In the event that, at the time of his succession to the Throne and Crown, the Emperor shall have attained the age of eighteen years, he shall, on the day determined by Him, but in any event not later than one year after His succession to the Crown, be anointed and Crowned as Emperor the provisions and details of the coronation being determined in the coronation Ceremonial of the Ethiopian Orthodox Church of 2nd November 1930.

ARTICLE 8

Regency shall exist in the event that the Emperor is unable to exercise the Imperial Office whether by reasons of minority, absence from the Empire, or by reason of serious illness as determined by the Crown Council. In such cases the Regency shall exercise in the name of the Emperor all the powers and prerogatives of the Crown, except that the Regency shall have no power to grant the title of Prince and shall have caretaker powers only as regard the properties of the Crown and of the Emperor, Regency shall automatically terminate upon the cessation as regards the Emperor, of the conditions having given rise to the regency, in accordance with the provisions of the present article. Regency shall be exercised respectively in the

situations as provided for in Articles 9 and 11, by the person or by the Council as provided for in Articles 10 and 11.

ARTICLE 9

In the event that the Emperor or in the event that the Crown Prince or the Heir Presumptive, in the situations provided for in Article 11, shall not have attained the age of eighteen years, the Regency shall be exercised by the Council of Regency as provided for in Article 11.

ARTICLE 10

The Council of Regency shall consist of the Empress Mother, the two descendants of the line of Sahle Sellassie most nearly related to the Emperor, as determined by the Crown Council, having reached the age of eighteen and being of sound mind, the Archbishop, the Prime Minister, the President of the Senate and the President of the Chamber of Deputies. The president of the Council of Regency shall be the Empress Mother, or, in Her absence, the Prime Minister. No decision of the Council of Regency shall be taken except by a majority vote of two-thirds of the members thereof.

ARTICLE 11

Regency shall be exercised by the Crown Prince or the Heir Presemptive, as the case may be, in the case of the serious illness, or the absence of the Emperor from the Empire. However, in the event that the Crown Prince or the Heir Presumptive, as the case may be, himself shall be subject to serious illness, or shall be absent from the Empire or shall not have attained his eighteenth year, the Regency shall be exercised by the Council of Regency, which shall automatically relinquish its functions to the Crown Prince or the Heir Presumptive, as the case may be, upon the cessation of any such disability of the Crown Prince or the Heir Presumptive, as the case may be. Serious illness of the Crown Prince or the Heir Presumptive, as the case may be, shall be determined by the Crown Council.

ARTICLE 12

Upon the birth of the Crown Prince, the Emperor shall designate the members of the Councils of Guardianship to be

convened and to assume its responsibility only in the event of Regency. The mother of the Crown Prince shall be ex-officio a member of such Council. The Council of Guardianship shall receive in trust for the Crown Prince one-third of the annual income and revenues received by the predecessor of the Crown Prince who has become Emperor, in conformity with the proviscions or Article 19 (*c*).

ARTICLE 13

(*a*) In the event that the Emperor shall at any time have no male descendant or no male descendant capable of meeting the requirements for succession to the Throne. He shall, after having previously consulted the Crown Council, publicly designate as Heir Presumptive from among His nearest male relatives, a direct descendant of Shale Sellassie, meeting the requirement for succession to the Throne.

(*b*) The determinations as to the qualifications for succession shall be made by the Emperor, after having previously consulted the Crown Council.

(*c*) In case of a determination that a male descendant is incapable of meeting the requirements for succession, such determination shall operate to exclude such male descendant in favour of the next male descendant. The designation of an Heir Presumptive shall become inoperative upon the subsequent birth of a male descendant.

(*d*) In case of the minority of the Emperor, the designation of Heir Presumptive shall, in accordance with the provisions of the present article, be effected by the Council of Regency. However, at the time of His coronation, and at any time thereafter, the Emperor shall be free to designate in accordance with the provisions of the present article another Heir Presumptive in replacement of the Heir Presumptive designated by the Council of Regency or previously, by himself.

ARTICLE 14

Throughout His minority the place of residence of the Emperor shall be the Imperial Palace. Absence therefrom for travel or educational purposes may be authorized by law. Upon

attaining the age of twelve years, the Emperor may make official appearances attended by the Council of Regency, the Princes, the "Balabats" and the dignitaries (Mekuanent).

ARTICLE 15

Any member of the Imperial family, who, being eligible for the succession, marries a foreigner or who marries without the consent of the Emperor, of the Regent or of the Council of Regency, as the case may be, shall forfeit all Imperial prerogatives for himself and his descendants.

ARTICLE 16

The Imperial family shall include all direct lineal ascendants and descendants, together with their spouses, of the Emperor, with the exception of those who have not complied with the provisions of Article 15 or who are not of the Ethiopian Orthodox Faith.

ARTICLE 17

The status, position, duties, responsibilities, privileges, emoluments, travels abroad and deportment of the Princes and of members of the Imperial family shall be considered by the Crown Council from time to time and their recommendations thereon shall be communicated to the Emperor for further action.

ARTICLE 18

Upon the death of the Emperor there shall be a period of full national mourning of three months followed by a period of half mourning of six months, and upon the death of the Empress there shall be a period of full national moruning of two months followed by a period of half mourning of four months. The Emperor shall proclaim lesser periods of full and half national mourning upon the deaths of other members of the Imperial family except that no period of national mourning may cause to be postponed a coronation more than one year from the date of the succession to the Crown of the Emperor of His attaining the age of eighteen. In the event that the coronation takes place during a period of full or half mourning, such period of mourning shall be terminated seven days before the coronation.

ARTICLE 19

(*a*) The regalia of the Crown including all the regalia of the Empress and of the Crown Prince are inalienable as belonging to the Empire.

(*b*) From the date of the proclamation of the present Constitution all realty registered in the name of the Crown (Bete Mengist) are held in trust for the Crown under the guardianship of the Emperor and are inalienable.

(*c*) It is the Emperor's right to administer all the inalienable properties of the Crown and all profits and revenues therefrom for the benefit of the Crown and the Empire ; and to receive and administer an annual appropriation, as provided by law, from the Imperial Treasury which shall, with the aforesaid profits and revenues, be adequate for the fulfillment of His functions under the present Constitution. In case of a Regency, the civil list shall be annually determined by law.

(*d*) All properties held in the names of the Emperor or members of the Imperial Family are private property and, as such, are under the same regime as that applicable to all properties of nationals of the Empire.

(*e*) The Emperor's Court shall be under His direction and He may make such arrangements as He thinks appropriate. He may, at will, appoint to, or dismiss from all posts at His Court, such persons as he shall see fit.

ARTICLE 20

Upon the establishment of a Council of Regency each member thereof shall take, in the presence of the Emperor, the following oath which shall be administered by the Archbishop :

> "In the name of the Almighty, and as a member of the Council of Regency, I hereby swear to defend with all my power the rights, privileges and inheritance of His Majesty the Emperor so long as I shall remain a member of the Council of Regency ; that I will at all times respect and defend the Constitution ; and that in all my actions and conduct, as a member of that Council, I will ever be motivated by respect for the Constitution and the firm resolve of protecting the rights, privileges and inheritance of His Majesty the Emperor so that they may be intact at the

the moment when He shall be anointed and Crowned Emperor of Ethiopia. So help me God."

The Archbishop shall himself take the same oath.

ARTICLE 21

On the occasion of His coronation, the Emperor shall take the following oath :

"In the name of Almighty God, WE .... the Emperor of Ethiopia swear that We will uphold and defend the Constitution of the Empire ; that We will govern Our Subjects with patience and devotion for their general welfare and in accordance with the Constitution and the laws ; and We will faithfully defend, with all the means in Our Power, the integrity and territory of Our Empire ; that We will faithfully see to the impartial execution of all laws approved by the Parliament and proclaimed by Us ; that We profess and will defend the Holy Orthodox Faith based on the doctrines of St. Mark of Alexandria, professed in Ethiopia since the Holy Emperors Abreha and Atshiba ; that We will ever promote the spiritual and material welfare and advancement of Our subjects that with the aid of the Almighty, We will faithfully execute the promises which We have here undertaken. So help Us God."

ARTICLE 22

On the occasion of the Coronation of the Emperor, if over twelve years of age, the Crown Prince or the Heir Presemptive, as the case may be, all members of the Crown Council and all members of the Parliament shall individually take an oath of homage and fidelity to the Emperor.

ARTICLE 23

In pursuance of the requirements of Article 22, the Crown Prince or the Heir Presemptive, as the case may be, if over the age of twelve shall take the following oath :

"In the name of the Almighty, I hereby swear that I will faithfully observe all the precepts and directions of My August Father ("Sovereign" in case of an Heir Presumptive) and will ever strive to respect His wishes and seek not after that which is not given to me, and be not as impatient as Adonias or as daring as Abeselom ; that I will

> ever conduct myself so as to be worthy of my Sire ("Sovereign" in case of an Heir Presemptive) of my Imperial Blood and of the high station which is ("may be" in case of an Heir Presumptive) my destiny ; that I will at all times, respect the Constitution and the laws, and will ever profess and defend the Faith of Our Orthodox Church. I swear that, with the assistance of the Almighty, I will faithfully, execute the promises which I have here undertaken. So help me God."

In the event that the aforesaid oath shall not have been taken on the occasion of the Coronation either by the Crown Prince or by the Heir Presumptive, as the case may be, it shall be taken before the Emperor by the Crown Prince or the Heir Presumptive, as the case may be, upon his attaining the age of eighteen.

ARTICLE 24

In pursuance of the requirements of article 22, the members of the Parliament shall take the following oath :

> "In the name of the Almighty I hereby swear allegiance and fidelity to my Sovereign His Imperial Majesty .... and that I will, as member of the Parliament, faithfully place above all else the interest and welfare of Ethiopia and of its Sovereign ; that I will, at all times, faithfully respect the laws and Constitution of the Empire, and that I will disclose no secret or confidential information revealed to me in connection with my official duty and position. So help me God."

ARTICLE 25

In pursuance of the requirements of article 22, the members of the Crown Council shall take the following oath :

> "In the name of the Almighty I hereby swear allegiance and fidelity to my Sovereign His Imperial Majesty .... and that I will, as member of the Parliament, faithfully place above all else the interest and welfare of Ethiopia and of its Sovereign ; that I will, at all times, faithfully respect the laws and Constitution of the Empire, and that I will disclose no secret or confidential information revealed to me in connection with my official duties and position. So help me God."

CHAPTER II

The Powers and Prerogatives of the Emperor

ARTICLE 26

The Sovereignity of the Empire is vested in the Emperor and the supreme authority over all the affairs of the Empire is exercised by Him as the Head of the State, in the manner provided for in the present Constitution.

ARTICLE 27

The Emperor determines the organization, powers and duties of all Ministries, executive departments and the administration of the Government and appoints, promotes, transfers, suspends and dismisses the officials of the same.

ARTICLE 28

The Emperor appoints Mayors of the municipalities referred to in Article 129 of the present Constitution from three candidates presented in each case by the Municipal Council thereof.

ARTICLE 29

The Emperor reserves the right, with the advice and consent of Parliament to declare war, He, further, reserves the right to decide what armed forces shall be maintained both in time of peace and in time of War, as Commander in Chief of the Armed Forces, He has the right to organize and command the said forces ; to commission and to confer military rank upon the officers of the said forces ; and to promote, transfer or dismiss any of the said officers. He has, further, the right to declare a state of siege, martial law, or national emergency, and to take such measures as are necessary to meet a threat to the defence or integrity of the Empire and to assure its defence and integrity.

ARTICLE 30

The Emperors exercises the supreme direction of the foreign relations of the Empire. The Emperor accredits and

receives Ambassadors, Ministers and Missions ; He alone has the right to settle disputes with foreign Powers by adjudication and other peaceful means and provides for and agrees to measures of co-operation with foreign powers for the realization of the ends of security and common defence. He, alone, has the right to ratify, on behalf of Ethiopia, treaties and other international agreements, and to determine which treaties and international agreements shall be subject to ratification before becoming binding upon the Empire. However, all treaties of peace and all treaties of international agreements involving a modification of the territory of the Empire or of a sovereignity or jurisdiction over any part of such territory, or laying a burden on Ethiopian subject personally, or modifying legislation in existence, or requiring expenditure of the State funds, or involving loans or monopolies shall, before becoming binding upon the Empire and the inhabitants thereof, be laid before Parliament and if both houses of Parliament shall approve the same in accordance with the provisions of article 88-90 inclusive of the present Constitution, shall then be submitted to the Emperor for ratification.

ARTICLE 31

(*a*) The Emperor alone confers and withdraws the title of Prince and other honours, and institute new orders.

(*b*) Without His special leave, no Ethiopian subject and no foreign nationals in any Government service in the Empire may accept any honour, insignia of orders, dignity or title of or from a foreign Government. The granting of any title, honour or order may exempt no one from the common duties and burdens of the subjects, nor may it carry with it any preferential admission to the offices of the State.

(*c*) Officials who are released from office with assurances of Imperial favour, retain the title and rank of the office they have filled.

(*d*) He also makes grants from abandoned properties, and properties is escheat for the purpose of recompensing faithful service to the Crown.

ARTICLE 32

The Emperor has the right to coin, print and issue money.

ARTICLE 33

The Emperor has the right to convene the annual sessions of the deliberative Chambers and to convoke extraordinary sessions thereof. At the opening of each session of the Chambers; He may present or cause to be presented a speech from the Throne concerning the legislative program recommended by Him. He has the right to postpone the opening of and to suspend, for not more than thirty days, and to extend any session of Parliament. He has the right to dissolve the Chamber or either of them by an order, providing at the same time, for the appointment of a new State or the election of a new Chamber of Deputies, or both, as the case may be, and for the convocation of the Chambers for a session within four months from the date of the Order.

ARTICLE 34

In accordance with the provisions of article 86, 88, 91 and 92 of the present Constitution, the Emperor has the right to initiate legislation and to originate other resolutions and to proclaim all laws, after the same shall have been passed by the Parliament.

ARTICLE 35

The Emperor has the right and the duty to maintain justice through the courts; and the right to grant pardons and amnesties and to commute penalties.

ARTICLE 36

The Emperor as Sovereign has the duty to take all measures that may be necessary to ensure, at all times, the defence and integrity of the Empire; the safety and welfare of its inhabitants, including their enjoyment of the human rights and fundamental liberties recognized in the present Constitution, and the protection of all His subjects and their rights and

interests abroad. Subject to the other provisions of this Constitution, He has all the rights and powers necessary for the accomplishment of the ends set out in the present article.

CHAPTER III

Rights and Duties of the People

ARTICLE 37

No one shall be denied the equal protection of the laws.

ARTICLE 38

There shall be no discrimination among Ethiopian subjects with respect to the enjoyment of all civil rights.

ARTICLE 39

The law shall determine the conditions of acquisition and loss of Ethiopian nationality and of Ethiopian citizenship.

ARTICLE 40

There shall be no interference with the exercise, in accordance with the law, of the rites of any religion or creed by residents of the Empire, provided that such rites be so utilized for political purposes or be not prejudicial to public order or morality.

ARTICLE 41

Freedom of speech and of the press is guaranteed throughout the Empire in accordance with the law.

ARTICLE 42

Correspondence shall be subject to no censorship, except in time of declared national emergency.

ARTICLE 43

No one within the Empire may be deprived of life, liberty or property without due process of law.

ARTICLE 44

Everyone has the right, within the limits of the law, to own and dispose of property. No one may be deprived of his property except upon a finding by ministerial order issued pursuant to the requirements of a special expropriation law enacted in accordance with the provisions of articles 88, 89 or 90 of the present Constitution, and except upon payment of just compensation determined in the absence of agreement, by judicial procedures established by law. Said ministerial order, to be effective shall be opproved by the Council of Ministers and published in the Negarit Gazeta.

ARTICLE 45

Ethiopian subjects shall have the right in accordance with the conditions prescribed by law, to assemble peaceably and without arms.

ARTICLE 46

Freedom of travel within the Empire and to change domicile therein is assured to all subjects of the Empire, in accordance with the law.

ARTICLE 47

Every Ethiopian subject has the right to engage in any occupation and form or join occupational associations, in accordance with the law.

ARTICLE 48

The Ethiopian family, as the source of the maintenance and development of the Empire and the primary basis of education and social harmony, is under the special protection of the law.

ARTICLE 49

No Ethiopian subject may be banished from the Empire.

ARTICLE 50

No Ethiopian subject may be extradited to a foreign country. No other person shall be extradited except as provided by international agreements.

ARTICLE 51

No one may be arrested without a warrant by a court, except in case of flagrant or serious violation of the law in force. Every arrested person shall be brought before the judicial authority within forty-eight hours of his arrest. However, if the arrest takes place in a locality which is removed from the court by a distance which can be traversed only on foot in not less than 48 hours, the court shall have discretion to extend the period of 48 hours. The period of detention shall be reckoned as a part of the term of imprisonment imposed by sentence. No one shall be held in prison awaiting trial on a criminal charge the sole penalty of which is a fine.

ARTICLE 52

In all criminal prosecution the accused, duly submitting to the court, shall have the right to a speedy trial and to be confronted with the witnesses against him, to have compulsory process in accordance with the law, for obtaining witnesses in his favour at the expense of the Government and to have the assistance of Counsel for his defence, who if the accused is unable to obtain the same by his own funds, shall be assigned and provided to the accused by the court.

ARTICLE 53

No person accused of and arrested for a crime shall be presumed guilty until so proved.

ARTICLE 54

Punishment is personal. No one shall be punished except in accordance with the law and after conviction of an offence committed by him.

ARTICLE 55

No person shall be punished for any offence which has not been declared by law to be punishable before the commission of such offence, or shall suffer any punishment.

ARTICLE 56

No one shall be punished twice for the same offence.

ARTICLE 57

No one shall be subject to cruel and inhuman punishment.

ARTICLE 58

No one shall be imprisoned for debt, except in case of legally proved fraud or of refusal either, to pay moneys or property adjudged by the court to have been taken in violation of the law, or to pay a fine, or to fulfill legal obligations of maintenance; this provision shall not have the effect of absolving the debtor's obligation.

ARTICLE 59

No sentence of death shall be executed unless it is confirmed by the Emperor.

ARTICLE 60

Confiscation of property as penalty shall not be imposed except in cases of treason against the Emperor or the Empire as defined by law; sequestration of property as a penalty shall not be imposed except in cases of property belonging to persons residing abroad and conspiring against or engaging in deliberately hostile acts against the Emperor or the Empire as defined by law. Attachment proceedings covering the whole or part of the property of a person made under judicial authority to cover payment of civil liability, or arising out of the commission of an offence or to meet taxes or fines, shall not be deemed a confiscation of property.

ARTICLE 61

All persons and all private domiciles shall be exempt from unlawful searches and seizures.

ARTICLE 62

(*a*) In accordance with tradition and the provisions of

Article 4 of this Constitution no one shall have the right to bring suit against the Emperor.

(*b*) Any resident of the Empire may bring suit in the courts of Ethiopia against the Government, or any ministry, Department, Agency or instrumentality thereof, for wrongful acts resulting in substantial damage. In the event that the courts shall find that such suit has been brought maliciously or without foundation, the Government, or any Ministry Department or Agency, instrumentality, or official thereof against whom or which such suit was brought, shall have a right of action against such resident for such malicious or unfounded suit, and the court shall in such cases decree remedies or penalties in accordance with the law.

ARTICLE 63

Everyone in the Empire shall have the right to present petitions to the Emperor in accordance with the law.

ARTICLE 64

Everyone in the Empire has the duty to respect and obey the Constitution, laws, decrees, orders and regulations of the Empire. Ethiopian subjects, in addition, owe loyalty to the Emperor and to the Empire, and have the duty of defending the Emperor and the Empire against all enemies, foreign and domestic ; to perform public services, including military services, when called upon to do so ; and to exercise the right of suffrage which is conferred upon them by the Constitution.

ARTICLE 65

Respect for the rights and freedoms of others and the requirements of public order and the general welfare shall alone justify any limitations upon the rights guaranteed in the foregoing articles of the present Chapter.

CHAPTER IV

The Ministers of the Empire

ARTICLE 66

The Emperor has the right to select, appoint and dismiss the Prime Minister and all other Ministries and Vice Ministers each of whom shall, before entering upon his functions, take before the Emperor the following oath of fidelity to His Majesty and to the Constitution :

> "In the name of the Almighty I hereby swear allegiance and fidelity to my Sovereign His Imperial Majesty .... and that, as member of the Council of Ministers, I will faithfully place above all else the interest and welfare of Ethiopia and of its Sovereign ; that I will, at all times, faithfully respect the Laws and Constitution of the Empire, and that I will disclose no secret or confidential information revealed to me in connection with my official duties and position. So help me God."

The appointment, promotion, transfer, suspension, retirement, dismissal and discipline of all other Government officials and employees shall be governed by regulations made by the Council of Ministers and approved and proclaimed by the Emperor.

ARTICLE 67

Princes eligible for the Crown shall not be appointed Ministers in the Council of Ministers. No one whose parents were not Ethiopian subjects at the time of his birth shall be appointed a Minister.

ARTICLE 68.

Each Minister shall be individually responsible to the Emperor and to the State for the discharge of the duties of his respective Ministry, including the execution of the laws and decrees concerning that Ministry.

ARTICLE 69

The Ministers shall form collectively the Council of Ministers and shall be responsible to the Emperor for all advice and

recommendations given to Him in Council. The rules and procedures of the Council shall be drawn up by the Ministers in Council and submitted to His Majesty for approval.

ARTICLE 70

The Emperor may in such instances as He deems appropriate, convene the Crown Council which shall consist of the Archbishop, such Princes, Ministers, and dignitaries as may be designated by Him, and the President of the Senate. The Crown Council shall be presided over by the Emperor or by a member designated by Him.

ARTICLE 71

The Ministers shall discuss in Council and through the Prime Minister submit to the Emperor all matters of policy therein discussed. In all cases in which legislation is deemed to be necessary or appropriate, the decision made in Council and approved by the Emperor shall be communicated by the Prime Minister to Parliament in form of proposal for legislation.

ARTICLE 72

The Prime Minister shall present to Parliament proposals of legislation made by the Council of Ministers and approved by the Emperor. He shall also present to the Emperor the proposal of legislation approved by the Parliament and the Decrees proposed by the Council of Ministers. He shall have the right to attend any meeting of either Chamber of Parliament, or any joint meeting of the Chambers, or any meeting of any committee of either Chamber, and to speak at such meeting on any questions under discussion. He shall be obliged to attend personally, or by his deputy, either Chamber when his presence is requested by majority vote of the members thereof and to answer verbally or in writing questions concerning his office.

ARTICLE 73

The Ministers shall have the right to attend any meeting of either Chamber of Parliament, or any joint meeting of the

Chambers or any meeting of any committee of either Chamber, and to speak at such meetings on any question concerning the conduct of their Ministries ; and they shall be obliged in person, or by their deputies, to answer verbally or in writing questions concerning the legislation be enacted.

ARTICLE 74

No Minister, nor any person in a position with or in the service of the Government may :

(*a*) For remuneration compensation or benefit of financial value engage in any activity or accept a position in or with any enterprise or organization in which there is no governmental participation ;

(*b*) enter into or be a part to any contract or other arrangements with any governmental organization in the Empire awarding, permitting or recognizing any concession or monopolistic or other exclusive privilege in the nature of a concession or monopoly ;

(*c*) however, such Minister or person shall be free to manage and develop his properties so long as their management or development is not prejudicial to or inconsistent with the performance of his duties.

ARTICLE 75

The Ministers including the Prime Minister may be tried only before the Supreme Imperial Court upon charges of offences as determined by the law, committed in connection with their official functions. Such prosecution may be initiated either by order of the Emperor or by a majority vote of both Houses of Parliament. A special prosecutor shall be appointed to that and conformably to the orders of the Emperor.

CHAPTER V

The Legislative Chambers

SECTION I

PROVISIONS APPLICABLE TO BOTH CHAMBERS

ARTICLE 76

The Parliament shall be composed of a Chamber of Deputies and a Senate. No one can be simultaneously a member of both the Chamber of Deputies and the Senate. The two Chambers shall meet together at the beginning and at the end of each session ; in the circumstances set forth in Articles 90 and 91 ; upon the call of the Emperor ; and upon such other occasions as may be determined by the Chambers. The President of the Senate shall preside at all joint meetings of the Chambers.

ARTICLE 77

The regular sessions of Parliament shall convene on the twenty-third day of the month of Tekemt of each year in the capital of the Empire and shall continue to the first day of the month of Sene (8 June).

Until a new Parliament shall be elected and convened in accordance with the present Constitution and the electoral law to be enacted, the two Chambers of Parliament, as hereto for constituted, shall continue to sit and shall, in accordance with the provisions and procedures established in Chapter V of the present Constitution, exercise the prerogatives and functions and fulfill the responsibilities provided for in respect of Parliament. The first election to the Chamber of Deputies shall be completed within two years from the entry into force of the present Constitution and in accordance with the provisions of the electoral law.

ARTICLE 78

No meeting of either Chamber of Parliament shall be closed to the public except upon a request by the Prime Minister or upon a decision by a majority vote of the Chamber of Depu-

ties or the Senate, as the case may be, to that effect. No joint meeting of the Chambers shall be closed to the public except upon a request by the Prime Minister or a decision by a majority of each of the Chambers to that effect. If after a question has been declared to be secret, a member of either Chamber makes it known to the public either in a speech, or by the press, or by writings or in any other way, he shall be punished according to the provisions of Penal Law.

ARTICLE 79

Neither of Chambers shall commence its deliberations on the first day of any session without the presence of two-thirds of its members nor continue its deliberations nor take any vote on any succeeding day of any sessions without the presence of a majority of its members. At joint meetings of the Chambers the presence of a majority of the members of each Chamber shall be required for deliberation and for voting.

ARTICLE 80

If the number of Deputies and of Senators prescribed in Article 79 is not present on the day designated for the convening of Parliament or if, thereafter, either of the Chambers or the Chambers in joint meeting cannot continue its deliberations or vote for lack of the required attendance, the members present shall take such measures as may be authorized in the rules of procedure of the respective Chambers to compel the attendance of a sufficient number of the absent members and their respective Presidents.

ARTICLE 81

Every Deputy or Senator before taking his seat in the Chamber to which he has been elected or appointed shall take before the Emperor, or if directed by Him before the President of th Legislative Chamber concerned, an oath of loyalty to the Emperor and to the Empire, and shall swear that he will obey the Constitution and the laws of the Empire and will perform his duties conscientiously and without fear or favour.

ARTICLE 82

Each Chamber shall determine its own rules of procedure and internal discipline.

ARTICLE 83

Members of Parliament shall receive salaries determined by law. Any law increasing the salaries of Members of Parliament shall be effective only from the date of election of the next Parliament.

ARTICLE 84

No action or charge may be brought against any member of Parliament or against any Minister appearing by right or upon the invitation of either Chambers for words uttered or written statements submitted by him at any meeting of either Chamber, or any joint meeting of the Chambers, or any meeting of any committee of either Chamber. Nevertheless every member of each Chamber of Parliament shall be obliged to respect all rules of order, conduct and procedure adopted by such Chamber for the transaction of its business and shall be subject to disciplinary action on the part of such Chamber for violation of such rules. No action or charge may be brought against any person or newspaper for publication, by or under the authority of Parliament or of either Chamber thereof, as the case may be, of any report, paper, votes or proceedings of Parliament or either Chamber thereof, as the case may be.

ARTICLE 85

No member of Parliament, during a session thereof, may be arrested or detained or summoned to answer a criminal charge unless the permission of the Chamber of which he is a member be obtained or he be arrested in flagrant delicto ; a comparable immunity does not apply to civil cases.

ARTICLE 86

Laws may be proposed to either, or both Chambers of Parliament :

(*a*) by the Emperor ;

(*b*) by ten or more members of either Chamber of Parliament, except that every proposal involving an involving an increase in Governmental expenditure or a new or increased tax shall first be presented to the Chamber of Deputies.

ARTICLE 87

All matters in either Chamber or in joint meetings of the Chambers shall be determined by vote of the majority of the members present, except as provided in Article 131. In the event of an equal division of votes, the presiding officer shall have a casting vote.

ARTICLE 88

Every proposal of legislation approved by one Chamber of Parliament shall be immediately forwarded through the President thereof to the other Chamber. If it is approved by the other without amendments within a period of two months, it shall be promptly communicated through the Prime Minister to the Emperor and either shall be promulgated as law, or shall be returned by the Emperor to the Chambers with His observations thereon, or with a new proposal of legislation as provided in Article 91. All laws duly approved by both Chambers or Parliament shall be forwarded to the Emperor through the Prime Minister by the President of the Chamber of Deputies and the Senate. In the event that such law shall receive the approval and signature of the Emperor, it shall be published by the Minister of the Pen in the Negarit Gazeta, with recital of the affixing of the signature and the Great Seal of the Emperor. All Imperial Decrees and all ministerial decrees and orders shall be published in the Negarit Gazeta.

ARTICLE 89

If a proposal of legislation approved by one Chamber is not finally acted upon by the other within the aforesaid period of two months, the Chambers shall meet together to discuss the said proposal. If the proposal is approved in such joint meetings, with or without amendment, within 30 days, it shall be communicated to the Emperor for action in accordance with Article 88.

ARTICLE 90

If within the aforesaid period of two months a proposal of legislation approved by one Chamber is approved by the other with amendments, the said proposal shall be returned to the first Chamber for further consideration. If, upon such further consideration, it is approved within 30 days, by the first Chamber, with the said amendments, it shall be communicated to the Emperor for action in accordance with Article 88. If within 30 days, the amendments, are not accepted by the first Chamber, the Chambers shall thereupon meet together to discuss the proposals. If in such joint meeting the proposal is approved with or without amendments, within 30 days, it shall thereupon be communicated to the Emperor for action in accordance with article 88.

ARTICLE 91

If a proposal of legislation approved in one of the Chambers is rejected by the other within two months after communications to the other, as provided in article 88, or if a proposal of legislation is not approved, with or without amendments, after discussion in joint meeting, as provided in Articles 89 and 90, full reports on the situation shall be promptly communicated to the Emperor by the President of both Chambers of Parliament, through the Prime Minister, and the Emperor may, thereupon, cause to be transmitted to both Chambers of Parliament His observations in regard to such proposals of legislation, or cause to be transmitted to the Chambers a proposal of legislation on the same subject.

ARTICLE 92

In case of emergency that arises when the Chambers are not sitting, the Emperor may proclaim decrees consistent with the Constitution which shall have the force of law upon publication in the Negarit Gazeta pending a decision on the same by Parliament. To that end, the text of each such decree shall be transmitted for consideration by both Chambers of Parliament at their first meeting following each such proclamation. In the event that, conforming to provisions of Articles 88, 89 and 90

of the present Constitution, Parliament shall approve such decrees, that shall continue in force and shall become law upon publication in the Negarit Gazeta of said approval.

In the event that Parliament shall disapprove any such decree, each such decree shall cease to have force and effect upon the publication in the Negarit Gazeta of such disapproval.

SECTION II

THE CHAMBER OF DEPUTIES

ARTICLE 93

The entire territory of the Empire as defined in Article 1 of the present Constitution shall be divided into electoral districts containing as nearly as possible two hundred thousands inhabitants. The location and limits of each electoral district shall be determined by law and each such district shall be as regular in shape as circumstances permit. In addition, each town with a population exceeding thirty thousands inhabitants shall be entitled to one Deputy and one additional Deputy for each fifty thousand inhabitants in excess to thirty thousand.

ARTICLE 94

Each electoral district shall be represented by two Deputies.

ARTICLE 95

All Ethiopian subjects by birth of twenty-one years of age or more who are regularly domiciled or habitually present in any electoral district and who possess the qualifications required by the electoral district for candidates from such district as members of the Chamber of Deputies. The system of voting shall be secret and direct. Details and procedure shall be prescribed by law.

ARTICLE 96

To be eligible as a Deputy, a person must be by birth an Ethiopian subject who:

(*a*) has reached the age of twenty-five years;

(*b*) is a bona fide resident and owner of property in his electoral district to the extent required by electoral law and

(*c*) is not disqualified under any provision of the electoral law.

ARTICLE 97

Deputy shall be elected for terms of four years and shall be eligible for re-election subject to their continued possession of the qualifications set forth in article 96.

ARTICLE 98

Vacancies that may occur in the membership of the Chamber of Deputies shall be filled as provided in the electoral law.

ARTICLE 99

The President and two Vice Presidents of the Chamber of Deputies shall be elected each year from and by the members of the Chamber.

ARTICLE 100

The Chamber of Deputies shall be sole judge of the qualifications and election of its members.

SECTION III

THE SENATE

ARTICLE 101

The Senate shall consist of the Senators appointed by the Emperor for six years.

ARTICLE 102

The Senate shall be composed of a number of persons, not exceeding one half of the total number of Deputies, to be chosen by the Emperor from among those who have, by their acts, secured the confidence and esteem of the people, and from among

those who have served their country and their Government with distinction.

ARTICLE 103

To be eligible for appointment as a member of the Senate a person must be by birth an Ethiopian subject who:

(*a*) has reached the age of thirty-five years;

(*b*) is a Prince or other Dignitary, or a former high Government official, or other person generally esteemed for his character, judgment and public services; and

(*c*) is not disqualified under any provision of the electoral law.

ARTICLE 104

The Senators first appointed by the Emperor as provided in article 101 shall, immediately after their first meeting, be divided into three equal groups. The Senators of the first Group shall be succeeded at the end of the second year by Senators appointed in accordance with the provisions of Article 101, those of the second group at the end of the fourth year, and those of the third group at the end of the sixth year, so that one third be succeeded every second year.

ARTICLE 105

Senators shall be eligible for re-appointment subject to their continued possession of the qualifications set forth in Article 103.

ARTICLE 106

Vacancies in the membership of the Senate shall be filled by appointments in the manner provided in article 101.

ARTICLE 107

The President and the two Vice Presidents of the Senate shall be appointed each year by the Emperor from among the Senators.

CHAPTER VI

The Judicial Power

ARTICLE 108

The Judicial power shall be vested in the courts established by law and shall be exercised by the Courts in accordance with the law and in the name of the Emperor. Except in situation declared in conformity with the provisions or Article 29 of the present Constitution, no person, except those in active military service, may be subject to trial by military courts.

ARTICLE 109

There shall be a Supreme Imperial Court and such other Courts as may be authorized or established by law. The jurisdiction of each court shall be determined by law.

ARTICLE 110

The Judges shall be independent in conducting trials and giving judgments in accordance with the law. In the administration of justice, they submit no other authority than that of the law.

ARTICLE 111

The Judges shall be appointed by the Emperor. They shall be of the highest character and reputation and shall be experienced and skilled in the law which they may be called upon to apply. Their nomination, appointment, promotion, removal, transfer and retirement shall be determined by a special law governing the Judiciary.

ARTICLE 112

Judges shall sit in public, except that in cases which might endanger public order or affect public moral they may sit in camera.

CHAPTER VII

Finance

ARTICLE 113

Not tax, duty, impost or excise shall be imposed, increased, reduced or abolished except by law. No exemption from payment of any tax, duty, impost or excise imposed by law shall be granted except as authorized by law.

ARTICLE 114

The fiscal year shall be fixed by special law. The Council of Ministers shall, each year, with the approval of the Emperor. and in accordance with the requirements of the law, present to Parliament a draft of a law for the approval of the budget of the following year, which budget shall accompany the said draft of law.

ARTICLE 116

Each of the Chambers of Parliament shall examine the said budget in detail and vote on it item by item. Parliament shall under no circumstances increase the total sum set down in the budget for expenditures. The allowance for the unforeseen expenses in the said budget shall be fixed by Parliament. Parliament shall complete the budget vote for submission to the Emperor, at least one month before the beginning of the new fiscal year.

ARTICLE 117

If the draft of the law presented as provided in Article 116 has not been approved by Parliament and proclaimed as law before the beginning of the fiscal year, the budget of the previous year shall continue in force until a new budget law has been proclaimed.

ARTICLE 118

If additional funds are urgently required in the course of any fiscal year, the Minister or Ministers concerned shall pre-

sent a supplementary budget to the Council of Ministers, who, with the approval of the Emperor may present an appropriate draft of law to the Chamber of Deputies.

ARTICLE 119

No loan or pledge, guaranty or collateral thereof may be contracted for within or without the Empire, by any Governmental organization within the Empire, except as authorized by a law duly adopted in accordance with the provisions of Articles 88, 89 or 90 of the present Constitution.

ARTICLE 120

Within four months after the end of every fiscal year the Council of Ministers shall present to the Emperor and to Parliament a detailed report on the receipts and expenditures of the said year. The report shall be immediately referred to the Auditor General, who shall within three months present his comments thereon to the Emperor and to Parliament.

ARTICLE 121

There shall be an Auditor General who shall be appointed by the Emperor, he shall be a person who is known to be of the highest character, as well as to possess the requisite technical capacity. His functions shall be defined by law. They shall include the auditing of the accounts of all Ministries, departments and agencies of the Government, and the making of periodic reports to the Emperor and to Parliament on the fiscal operations of the Government. The Auditor General shall at all times be entitled to have access to all books and records relating to the said accounts.

CHAPTER VIII

General Provisions

ARTICLE 122

The present revised Constitution, together with those international treaties, conventions and obligations to which Ethiopia shall be party, shall be the supreme law of the Empire, and all

future legislation, decrees, orders, judgments, decisions and acts inconsistent therewith shall be null and void.

ARTICLE 123

The city of Addis Ababa is the capital of the Empire.

ARTICLE 124

The flag of the Empire consists of three horizontal bands, the uppermast green, the middle yellow and the nethermast red, in such detail as determined by law.

ARTICLE 125

The official language of the Empire is Amharic.

ARTICLE 126

The Ethiopian Orthodox Church, founded in the fourth century, on the doctrines of Saint Mark, is the established Church of the Empire and is, as such, supported by the State. The Emperor shall always profess the Ethiopian Orthodox Faith. The name of the Emperor shall be mentioned in all religious services.

ARTICLE 127

The organization of secular administration of the Established Church shall be governed by law. The Archbishop and Bishops shall be elected by the ecclesiastical electoral college consisting of representatives of the clergy and of the laity of the Ethiopian Orthodox Church. The spiritual consecration shall be performed according to the Canonical Law subject to the approval of the Emperor of their election and appointment. The Emperor has the right to promulgate the decrees, edicts and public regulations for the Church except those concerning monastic life and other spiritual administrations.

ARTICLE 128

No one shall utilize religious activities or organizations for commercial purposes except as authorized by law.

ARTICLE 129

Subject to the conditions established by legislation duly adopted in accordance with the provisions of Articles 88, 89 or 90 of the present Constitution, all town shall be incorporated by Charters established in accordance with such legislation, and municipal councils shall be established respectively in municipalities of the Empire.

ARTICLE 130

(*a*) The natural resources of, and the sub-soil of the Empire including those beneath its waters, are State Domain.

(*b*) The natural resources in the waters, forests, land, air, lakes, rivers and ports of the Empire are a sacred trust for the benefit of present and succeeding generations of the Ethiopian people. The conservation of the said resources is essential for the preservation of the Empire The Imperial Ethiopian Government shall accordingly take as such measures as may be necessary and proper, in conformity with the Constitution, for the conservation of the said resources.

(*c*) None of the said resources shall be exploited by any person natural or judicial, including all lands in escheat, and all abandoned properties, whether real or personal, as well as all products of the sub-soil, all forests and all grazing lands, water courses, lakes and territorial waters are State Domain.

ARTICLE 131

The Constitution may be amended by an identical Joint Resolution adopted by three-fourths of the members of each Chamber in two separate sessions of Parliament and proclaimed with the approval and authority of the Emperor.

Given at Addis Ababa this twenty-fourth day of Tekemt (4th November 1955).

SPEECH OF EMPEROR HAILE SELASSIE I ON ERITREAN UNIFICATION

November 15, 1962

"When the name of Ethiopia first appeared in the pages of history, Eritrea formed an integral part of Our nation. Our ties do not consist merely in having lived together as one country. Ethiopia and Eritrea shared a common heritage of territorial continuity, race and language, and Eritrea has served as one of the main fountains of Ethiopian civilization and culture.

"In the latter part of the 19th Century, when the colonial powers separated Eritrea from the rest of Ethiopia and established in Eritrea a rule which lasted for about 60 years, it was their aim to establish a separate Eritrean identity and to dissociate Eritrea from the motherland. In this, the colonialists failed completely. There is no greater evidence of the bankruptcy of this cruel policy than the fact that not only those elderly Eritreans who had happily experienced the value of freedom in unity, but even those who were born during the colonialist occupation of their country, voluntarily separated themselves from their parents, and relatives and, emigrating to the motherland, shed their blood for the cause of reunion of Eritrea with Ethiopia and, during the Fascist invasion, for the liberation of the entire nation.

Fruit of Sacrifice

"Those Eritreans who so gallantly sacrificed themselves on the battlefield did not die in vain. Their children stand today as living reminders of the determination of the people of Eritrea to maintain the unity of Ethiopia in freedom. When the invader was driven from Our nation by the combined efforts of Eritreans and Ethiopians alike, the international political situation was such that, unfortunately, no measure of Eritrean unity with Ethiopia could be immediately attained. Thus we were compelled to continue Our struggle for an additional decade before Eritrea was returned to its motherland. With the blessing of Almighty God, Our just efforts and struggles came to fruition,

just 10 years ago, in Eritrea's federation with the rest of Ethiopia—although this particular form of association was not that for which We had struggled, and it had been requested by no one.

"Nonetheless, because of the world political situation then prevailing, the people of Eritrea, through their elected representatives, acceeded to the Federation, and upon Our approval the federal system was put into operation and has continued to this day.

Alien Imposed Federation

"In the last decade, the people of Eritrea have increasingly come to realise that the Federation, alien to their tradition and experience, was superfluous and unnecessary among people whose unity had stood the test of time. Moreover, the operation of this system was necessarily beset by serious difficulties, which, among other consequences, tended to retard the pace of economic and social development. As the years passed, the people of Eritrea repeatedly requested Us to abolish the federal system and to re-establish the age-old integrity of Eritrea with the rest of Ethiopia. We are aware that many modern nations, including a number of major powers, do not accept the concept of federalism of their own people and prefer instead a unitary form of government. We also know that among those nations which have subscribed to the principle of federalism, many have been compelled by the demands of the fast moving modern age to adopt measures designed to mitigate the adverse effects of this system upon the rate of progress of their people. But, nonetheless, We have, in good faith, allowed this system, foreign to our history and experience, to function without let or hindrance.

Slowed Progress

"The consequence of the past decade are known to all. The Federation instituted between the people of Eritrea and the rest of Ethiopia has tended to slow the speed of the economic and social progress of the entire nation, including Eritrea.

"The Federation has increasingly been manipulated as a ready-made tool through which the enemies of Ethiopian and

Eritrean progress and solidarity have endeavored to further their designs.

"The Federation contains the inherent danger of creating misunderstandings among people who have, for centuries past, experienced no problems in living together.

"The Federation, by duplicating administrative apparatuses, has occasioned waste of both human and material resources which could have been otherwise utilised for development purposes.

"One is, accordingly, fully justified in concluding that the unfortunate consequences of this particular form of federation and the needs of the age, and not any conscious effort on the part of the people concerned, have brought about its demise.

"Any responsible person who has deliberated upon and examined carefully the unfortunate consequences flowing from the federal system under consideration will feel no surprise that the people of Eritrea, who have had the misforune of being directly subjected to its adverse consequences, have urged and pleaded that it be eliminated and replaced by a unitary form of administration. The steps We are now about to take, therefore, merely confirm and implement the result which the natural solidarity of the Ethiopian people and their wise desire for closer collaboration has already brought about.

"The people of Eritrea, through their representatives gathered together in the Eritrean Assembly, recognising the harmful consequences of the operation of the federal system through the experience of the past decade, desirous of living together with their other Ethiopian brothers without hindrance or obstacle, have formally requested, by their resolution voluntarily and unanimously adopted on November 14, 1962, that the federation be dissolved. In its place, they have asked for the complete administrative integration of Eritrea with the rest of Ethiopia in order to facilitate and speed the economic growth and development of the nation. We have accepted this resolution and have consented to its being placed into effect.

"The human rights and fundamental freedoms contained in the former Constitution of Eritrea are, equally, important provisions existing in the Constitution which We promulgated for Ethiopia in 1955. The people of Ethiopia have enjoyed and will

continue to enjoy these basic freedoms, and they shall continue to be protected zealously. All rights, privileges, concessions and exemptions of whatever nature granted to persons or companies within Eritrea, whether foreign or national, are sacred obligations which will not be impaired or affected in any manner.

Delegated Autonomy

"In Our Throne Speech of November 2nd, 1962, We spoke of measures under consideration whereby administrative authority will be delegated to local administrations to direct their own activities in such designated fields as education, health, transport, communications and so on. Until such time as these measures have entered into force and are fully implemented and until the laws and regulations now in force in Eritrea are revised and replaced, existing Eritrean legislation will remain valid.

"Throughout Our nation's history, the Ethiopian people have spared no sacrifice to maintain their unity and independence. Today, closer and more united than ever, they stand ready to guard, jealously and gallantly, this unity and independence in their peaceful and determined march toward progress and prosperity. We thank Our people of Eritrea who, guided by a deep sense of patriotism and unity, have laboured without cease to bring about this advancement. We vew before God that, as We have repeatedly stated, We shall spare no effort to secure the happiness and advancement of Our people.

"We are thankful to Almighty God Who, through His Grace, has spared Us to see this day."

OFFICIAL PROCLAMATION OF ETHIOPIAN GOVERNMENT TERMINATING THE FEDERAL STATUS OF ERITREA

ORDER No. 27 of 1962.

An Order to provide for the Termination of the Federal Status of Eritrea and the Application to Eritrea of the System of Unitary Administration of the Empire of Ethiopia.

CONQUERING LION OF THE TRIBE OF JUDAH...
HAILE SELLASSIE I
ELECT OF GOD, EMPEROR OF ETHIOPIA

WHEREAS, on the 11th September, 1952 the Territory of Eritrea was federated with Ethiopia under the sovereignty of the Ethiopian Crown ; and

WHEREAS, the people of Eritrea have come progressively to realise the disadvantage flowing from the federal system of administration and have increasingly and repeatedly requested the abolition of this system, which they have never sought, and application to Eritrea of the system of unitary administration presently uniformly applied throughout the Empire ; and

WHEREAS, the Eritrean Assembly, by resolution unanimously adopted on 14th November, 1962, has expressed the will of the people of Eritrea that the federal system of administration be terminated and that Eritrea be wholly integrated into the unitary system of administration of the Empire of Ethiopia ;

NOW THEREFORE, in recognition of the desires of the people of Eritrea, convinced that the pace of the economic and social development of the Empire of Ethiopia has been adversely affected by the application of the federal system of administration, and taking into account the resolution unanimously adopted by the Parliament of the Empire of Ethiopia on 15th November, 1962 giving full support to the resolution of the Eritrean Assembly, we hereby order as follows :

1. This order may be cited as the "Termination of the Federal Status of Eritrea and the application to Eritrea of the system of Unitary Administration of the Empire of Ethiopia Order, 1962".

2. The federal status of Eritrea with Ethiopia is hereby terminated, and Eritrea which continues to constitute an integral part of the Empire of Ethiopia, is hereby wholly integrated into the unitary system of administration of Our Empire.

3. The Revised Constitution of Ethiopia given by Us as the Sovereign and Crown of the Empire of Ethiopia on 2nd November, 1955 shall continue to be the sole and exclusive Constitution to apply uniformly throughout the territory of the Empire of Ethiopia.

4. All rights, including the right to own and dispose of real property, exemptions, concessions and privileges of whatsoever nature heretofore granted, conferred or acquired within Eritrea, whether by law, order, contract or otherwise, and whether granted or conferred upon or acquired by Ethiopian or foreign persons, whether natural or legal, shall remain in full force and effect.

5. All rights, powers, duties and obligations of the former Administration of Eritrea become, by virtue of this Order, the rights, powers, duties and obligations of the Imperial Ethiopian Government.

6. All enactments, laws and regulations or parts thereof which are presently in force within Eritrea or which are denominated to be of federal application, to the extent that the application thereof is necessary to the continued operation of existing administrations, shall, until such time as the same shall be expressly replaced and repeated by subsequently enacted legislation, remain in full force and effect, and existing administration shall continue to implement and administer the same under the authority of the Imperial Ethiopian Government.

7. This Order shall come into effect on 15th November, 1962.

Tsahafe Taezaz Aklilu Habte Wold

Prime Minister and Minister of Pen

IRAQ-JORDAN

IRAQ-JORDAN

Iraq :	Area	653,151 sq. km.
	Population	6,413,658
Jordan :	Area	96,500 sq. km.
	Population	1,690,000

CONTENTS

A FEDERATION CREATED BY THE CLOSELY RELATED SOVEREIGNS OF TWO INDEPENDENT KINGDOMS SUCCUMBS TO A POLITICAL REVOLUTION.

THE IRAQI-JORDAN FEDERATION

HISTORICAL BACKGROUND

On February 14, 1958, a Federation between the Kingdom of Iraq and Jordan was proclaimed in Amman and was ratified by the parliaments of the two countries on March 26, following.[1] It was a royal compact. The two young kings were cousins—great grandsons of the founder of the Hashemite dynasty—the Grand Sherif Hussein Ibn Ali, King of the Hejaz. Hussein, the King of Jordan, who as a boy had witnessed the assassination of his grandfather Abdullah,—had been educated at Harrow and Sandhurst and had become King in 1952, on the deposition of his father, incapacitated by mental illness. In Iraq, Feisal, who had also been at Harrow, had ascended the throne in 1953, after the termination of the regency which had followed his father's accidental death in 1939.

The federation of the two monarchies was thus based on political and personal considerations. Economic interests held a subordinate place. With a population four times larger and vast economic potentialities, including its oil fields, Iraq had no economic reason to link itself with a small, unviable State, whose territory was largely desert land and which was already saddled with more than a half a million turbulent refugees. Not only was the territory of Jordan less than 20 % of the whole area ; her population was in scarcely larger proportion ; and she was being largely supported by Britain and the United States. The Jordan budget was unbalanced and only in March of the same year it had been compelled to ask the American government to allow half of the sum of $10,000,000 that had been allotted for economic aid to be used to cover the budget deficit. There were, however, various bonds between the two States. Geographically they were neighbours. There were strong religious ties. Their currencies were based on sterling. Their

---

(1) v. Documents.

policies were generally the same. But above all both countries realized the importance of union as a measure of political security.

Union between the two States had moreover been a cherished dream of Jordan's former King Abdullah. It was viewed as a step towards Arab Unity and as a protest against both imperialism and Zionism. On this feature of their common policy the observations of the two Kings may be recalled :—

> *King Hussein:* "On this day, we turn our hearts towards Palestine and we promise before God to work as before to achieve our rights, which were stolen by the enemy. We will not lay down our arms until we have achieved our aims."
>
> *King Feisal:* "We shall defeat our common enemies and regain all usurped parts of the Arab homeland."

The announcement of the formation of the United Arab Republic thus was seen as a threat to the existence of the dynasties of which they were the last survivors. It was the signal for a counter measure.

The Federation was short-lived. A meeting of the Parliament of the Union, composed of twenty members from each State, was held on May 27—and a meeting of the Union Executive—the Council of Ministers—on May 29, at which Nuri el Said was elected President of the Council, were shortly followed by the sanguinary revolution of the following July, in Iraq, and the assassination of King Feisal. Nine days after the announcement of the *coup d'état* and the proclamation of the Iraq Republic on July 14, the Iraqi Government, denouncing the Federation as an attempt to consolidate a corrupt monarchial system, formally withdrew and repudiated all obligation resulting from its establishment. A similar act of denunciation of the Union was made by the Council of Ministers of Jordan, effective August 1, 1948. [1]

The short duration of the federation deprives us of the opportunity to appraise the value of the proposed plan of govern-

---

(1) For texts of these declarations see Documents 4-5. For King Hussein's version of events v. his autobiography "Uneasy Lies the Head".

ment. It is impossible to know how well, or how badly, the elaborate machinery might have worked in the face of personal and political forces well calculated to upset the most clearly defined constitutional balances. All we can do today is to examine the Constitution as it was written and to note briefly the activities to which it gave rise. (1)

The Preamble to the Constitution is interesting as recording the essentially dynastic influences dominating the movement, and thus foreshadowing its fatal weakness. (2) The following extract from the text is significant :—

> "Whereas : the mission of the Arab Revolt, for which its leader has striven, passed to the sons and grandsons and was inherited by generation after generation to remain always as a flame illuminating the path of the Arab Nation toward the realization of its hopes and aspirations........... Therefore, the two Hashemite States decide to form a federation between themselves based on these sublime aims."

The Preamble included various specific aims to be achieved, including measures to be taken for "complete unity" between the States in foreign policy and diplomatic representation, unity of the two armies, elimination of customs barriers and unification of educational curricula, currency, and of financial policy. The Constitution consists of eighty articles under the following chapter titles ; General Provisions, Legislative Authority, Executive Authority, Judicial Authority, Jurisdiction of the Federation, Finance of the Federation, Amendment of the Constitution, Miscellaneous Provisions.

CONSTITUTIONAL STRUCTURE

The following explanation of the new constitutional system, given by the Minister of Foreign Affairs in a radio address delivered at the time of its promulgation, (3) is of interest.

---

(1) For concise summaries of the political structure, v. James Morris, 'The Hashemite Kings', London, 1959, pp. 218-219. Benjamine Shwadran, 'Middle Eastern Affairs', Dec. 1958, p. 379. M. Perlmann, 'Middle Eastern Affairs', April 1958, pp. 127-8.

(2) For Constitution, v. Documents ; for Preamble, v. Khalil, Vol. I, pp. 79-80.

(3) Address by H.E. Borhan Al Din Bashayan, Minister of Foreign Affairs, delivered from Baghdad Radio Station, Feb. 16, 1958.

"The most important characteristic of this Union between Iraq and Jordan is that it is a natural union between two neighbouring countries. From the economic point of view this union is a union between two countries which realize economic integration.

It is a realistic union for it transferred Iraq's border to the boundaries of Israel, thus facilitating Iraq to honour its commitments in repelling the Zionist menace to Jordan and the other Arab countries.

We were keen to build this Union on sound practical bases which emanate from our entity and interests, and, therefore, we agreed to have one person at the head of the union, to avoid instability resulting from alternation. Yet, since the door of this Union is open for other Arab countries to join, we have consented to review the question of the Head of the Union so that this may not constitute an obstacle which stands in the way of expanding the Union.

We also took into consideration equality in Parliamentary representation following the same pattern of many united states such as, for example, the United States of America.

Baghdad and Amman by alternation will serve as seats of the Government of the Union. This principle is acceptable in the State of Libya which has two capitals ; Tripoli and Benghazi. One advantage is that it alleviates the effects of centralization and contributes to the economic and social growth of the two capitals.

The other details will be dealt with in the Constitution of the Union which we are keen to couch in the same spirit which inspired the Union.

We consider, however, what has so far been accomplished as a preparatory step for several other steps which we hope will lead to the realization of our national growth and full unity.

As will be seen the Federal Government was a combination of presidential and ministerial systems with a strong concentration of power in presidential hands, the office of President being reserved permanently to the King of Iraq, except in the case of his absence when the King of Jordan was to take his place (Art. 5). "Executive authority" (Art. 35) was vested in the President to be exercised through the Council of Ministers, but the Prime Minister was appointed directly by the President, and could be discharged by him, no provision being made for legislative approval in either case.

The principle of ministerial responsibility found expression in the provision giving to the Federal Assembly the right of a vote of no confidence as to either the cabinet or a particular minister, such vote entailing the resignation of the officer or officers in question. In one case, however, the presidential power was subject to parliamentary approval; the President was authorised to conclude treaties (Art. 52), but their ratification was subject to the approval of the Federal Assembly. [1]

The distribution of powers in the federation (Art. 62) followed the accepted federal pattern, reserving to the federal government such matters as foreign affairs, the defence of the State, customs, currency, communications, etc., and adding as a special category "any matter that the Federal Assembly decides by a two-third majority to consider a federal matter, after the consent of the governments of the Member-States." Other matters were reserved to the member-states. A somewhat elaborate provision was made for constitutional amendment involving the approval of a two-thirds majority of all the members of the Federal Assembly, subject to the approval by absolute majority of the legislative chambers of the States.

It is particularly to be noted that the Constitution reserves to each State "its independent international personality (Art. 2) but in view of the broad scope of federal jurisdiction over foreign affairs, one may well inquire what measure of such personality remained to the member-states. [2]

---

(1) The Constitution of Jordan was formally amended (Art. 33) by deleting certain phrases inconsistent with the Constitution of the Union—notably the right of the King to declare war—but leaving intact the right of Jordan to conclude treaties—a result, as observed in a memorandum prepared by the Office of the Legal Adviser of the American State Department, which was clearly in conflict with the new federal constitution of the Union (Art. 62-2). The memorandum raises also the question as to whether one of the constituent States of a federal union can maintain diplomatic relations and conclude treaties which are applicable solely to that constituent State. See Vol. I, Whiteman, p. 420.

(2) We are reminded of the observation of Hyde in reference to the American States which "by reason of their inability to enter into diplomatic relations with the outside world" are held to be "incapable of treatment as persons of international law." (v. Hyde I, para. 8). Incidentally the use of the word

Confirmation of the independence within their several spheres of the Federal and State governments is sought in the elaborate provisions confiding to the Supreme Court the power of constitutional review of legislation upon request for a decision being made by the Prime Minister of the Federation or of one of the Member-States (Art. 59).

It was specifically provided (Art. 63) that the federal power should be exercised directly "on all authorities and individuals in the territories of the two States", a feature generally considered as one of the essential characteristics of a federal system. The right of the federal government to impose and collect taxes by direct action, was also secured by a provision (Art. 64), that "fixed sources of revenue shall be assigned to the Federal Government and placed under its disposal through the imposition of taxes and duties."

A special proviso fixed the proportion of the contributions to the federal budget for the first fiscal year at 80 % for Iraq and 20 % for Jordan, a division corresponding roughly to the ratio of population. After this period the proviso already noted as to the relinquishment of sources of revenue, was to be applied, reserving further to the federal government in the case that such relinquishment was not realised, "the right to impose on the sources" of revenue of Member-States to the measure necessary to meet the expenditure of the Federation.

THE ARMY AN OBSTACLE TO FEDERATION

The trouble spot in the new plan was the Army. The Jordan Army, which had owed its creation to King Feisal and Colonel Lawrence during the First World War and had inherited the fine traditions established under the legendary figures of Peake and Glubb, was still efficient but was relatively small. It consisted of four infantry brigade groups and an

---

'sovereignty' in connection with federations raises interesting and perhaps insoluble questions of definition. See, for example, the exchange of letters in the "London Times"—June 1953—and the observation of Sir D. W. Brogan contesting the applicability of the term 'sovereignty' to the United States.

armoured brigade—a few fighter aircraft and a national guard of 30,000. The last British forces had left Aqaba in July 1957. The Iraq Army, in September 1956, included three divisions with several squadrons of fighter aircraft. (General Glubb had been dismissed two years before. [1]) Iraq with much larger effectives had for years been contributing heavily to its support and insisted on maintaining full control under the new regime, as witness the provision that the "actual exercise of command" was vested in a Chief of Staff, appointed by the President—*i.e.*, —the King of Iraq—a highly unbalanced arrangement for a Federation.

EMERGENCY POWERS

The provisions of the Constitution (Art. 73) conferring emergency powers present another unusual feature. Separate provisions are made both for the establishment of a *state of siege* and for the declaration of *martial law*—one of these institutions representing French tradition, the other the Anglo-Saxon system. It is difficult to know what was in the mind of the draughtsmen in establishing this duality of procedure. The "state of siege" is a well known feature of European constitutions, authorising the setting up of a so-to-speak constitutional regime of martial law. It was authorised by the Egyptian Constitution of 1923 and was formally proclaimed in 1939. Similar provisions have existed in other Middle East constitutions. In general the constitutional provisos prescribe in detail the circumstances of special emergency under which it can be set up, the manner of the appointment of the official, usually a military commander, to whom powers of government are entrusted, and the field of action over which these powers are to extend. Martial law, on the other hand, is a legacy from the British common law, and has not been constitutionally defined. Based on a state of necessity it was proclaimed in Egypt in 1914 and remained in force until 1923.

---

(1) See 'The History of the Arab Legion', Brigadier John Bagat Glubb, London, 1948, especially p. 57 et seq.

In the present case we find that the existence of a state of siege is authorised "in case of emergencies threatening public security in any part of the countries of the Federation." It is to be the subject of a special law, which was not in fact enacted, which was to include the granting of a power "to suspend ordinary laws."

The powers to be granted in the case of martial law are somewhat broader. In addition to the emergencies mentioned above, to which the phrase "serious disturbances" is added, we have the words "danger of aggression" on any section of the countries of the Federation—with the proviso that martial law may be declared in the part or section subject to the disturbances. Further blanket provisions applicable to both cases hold persons exercising the several orders "legally responsible for their actions" in accordance with law "until they are relieved of their responsibility by a special law made for this purpose."

THE FEDERAL PRINCIPLE

It may well be asked whether this Iraq-Jordan Federation although so-styled, can be taken as an expression of the federal principle, in view of the predominant position reserved to the larger State, to say nothing of the reservation to each of its "independent international personality." As Wheare observes :— "There must be some sort of reasonable balance which will ensure that all the units can maintain their independence within the sphere allotted to them and that no one can dominate the other." It would certainly be difficult to assume that any such condition of balance existed in the present case.

On the further question as to how far, quite apart from the contigency that did in fact arise, of a social revolution in one of the States, the plan of association was in itself a workable one, the answer is still more doubtful. It was proposed to set up a highly complicated governmental structure with an elaborate combination of democratic features—popular elections, parliamentary regime, ministerial responsibility and strong presidential powers. Would it have been possible for a federal government to have successfully asserted its powers throughout the area of two such unbalanced States ? (The example of Libya

is instructive here). And was there available that supply of expert personnel—the civil servants—required to make such a system work ?

It remains to add that after several years of perilous isolation Jordan has sought an opportunity of strengthening her position, through an association with her sister Arab States in the reorganised United Arab Republic of 1963. Together with Iraq, she was present at the Summit Meeting of Arab Kings and Presidents, and at the Merger Day Celebrations held in Cairo in 1964. The visit of King Hussein to Egypt in March 1964, is a confirmation of a new spirit of union.

In a press conference held in March 1963 (1), King Hussein expressed the willingness of Jordan to join an Arab Federation on an equal basis of individual sovereignty. He added :—

> "We believe we are an undivided part of the Arab nation and any good done to it, is also good for us. Our aims and aspirations are the same. Our country has been serving the Arab nations and working to achieve their aims and objects.

While there seem no prospects for further attempts at federation, it is to be assumed that both these States will assume a cooperative role in any further steps towards closer association between the Arab States.

---

(1) "Egyptian Gazette", March 17, 1963.

UNITED ARAB REPUBLIC

UNITED ARAB REPUBLIC

1958

Egypt	:	Area	586,198 sq. m. (13,500 cultivated)
		Population	26,065,000
Syria	:	Area	72,234 sq. m.
		Population	4,700,000

CONTENTS

A CENTRALIZED REPUBLIC CREATED BY A FUSION OF INDEPENDENT STATES IS DISRUPTED BY WITHDRAWAL OF ONE OF ITS MEMBERS, FOLLOWING WHICH MEASURES ARE EXPLORED FOR THE CREATION OF A BROADER UNION UPON LOOSER LINES.

UNITED ARAB REPUBLIC

February 1, 1958

CREATION OF THE U.A.R.

The creation of the United Arab Republic was proclaimed to the world by the Presidents of Egypt and Syria, on February 1, 1958, and was followed on March 5 by the publication of a Provisional Constitution. (1) The dominating purpose of the new Constitution was the furtherance of Arab Unity. The Republic was to be one more step in a campaign to extend the political expression of this unity throughout the entire Arab world. The Proclamation left no doubt as to this purpose. We read :—

> "In deciding on the unity of both countries, the participants decide that their purpose is the unity of all Arabs and that the door is open for participating by each and every Arab State desirous of joining either in a union or federation for the purpose of protecting the Arab peoples from harm and evil, reinforcing Arab sovereignty and safeguarding its existence."

It was clear from the first that the founders of the new republic proposed to create not a federal but a unitary State. President Nasser, in his address to the joint session of the National Assemblies spoke of the merger of the two peoples of one nation "converting them into one united republic." President Quwatly of Syria used similar language in proclaiming "the union of these two beloved Arab countries, these two long-struggling nations, into one homeland, unified in all respects with no discrimination, limitation or reservation." The principle is confirmed in the word of Article 1, of the Constitution itself. "The United Arab State is a democratic, independent sovereign

---

(1) v. Documents. It had been preceded by independent referendums and elections held in both Syria and Egypt, approving, by a practically unanimous vote, both the formation of the Union and the election of Gamal Abdel Nasser as President of the United Arab Republic.

republic, and its people are part of the Arab Nation." The principle of unification found clear expression in the structure of the new State. (1) All legislative power is vested in the National Assembly. The only direct reference to the political existence of the two constituent States of Egypt and Syria is found in the following provision of the Constitution (Art. 58) :—

> "The United Arab Republic consists of two regions ; Egypt and Syria. In each, there shall be an Executive Council appointed by Presidential Decree. This Executive Council has the competence to examine and study matters pertaining to the execution of the general policy in the region."

Other article provide (Art. 13) that half of the members of the National Assembly must be members of the Syrian Chamber of Deputies and the Egyptian National Assembly ; that existing legislation in the two areas should provisionally remain in force (Art. 68), that existing treaties should remain valid (Art. 69), that special budgets should be provisionally established for the two regions (Art. 70) and that public services within each of them should also be provisionally maintained (Art. 71).

As noted no legislative power was reserved to the Regions The Council may only "examine and study" matters of general policy relating to its own region. (The exact extent of this power is not clear). No provision is made for regional legislation or for the distribution of powers characteristic of a federal system. Pending the adoption of definite measures to elaborate a common budget, there was also established, in addition to the budget of the State, a special budget applicable within the framework of Syria and of Egypt respectively. The laws, decrees and regulations "in force in the two regions" (Art. 68), and the

---

(1) "The U.A.R. was neither a personal union nor a confederation because its two parts were neither States nor separate international persons. It was not a federal State because it had one legislative assembly and one legal system whereas one fundamental principle of a federal State is "that the division of powers between the central government and the members of the federation cannot be determined by the central government itself, without the consent of at least a majority of those latter." "Arab Unity in Terms of Law" M.F. Anabtawi. The Hague, 1963, p. 179, quoting W.J. Wagner, "The Federal States and their Judiciary", 1959, pp. 13 and 27.

existing public services (Art. 71), were to remain in effect until amended under the procedure established by the new Constitution.

As the legislative power was vested by the Provisional Constitution in the National Assembly, the first law promulgated by the new Republic conferred legislative powers on the President. By this law the President is authorised to exercise all powers conferred, in the provinces of both Egypt and Syria, on their respective Presidents, as well as that conferred on their Councils of Ministers. The President was also given the right to confer the exercise of his perogative on vice-presidents and ministers. It may be noted also, that under Article 53 of the Constitution, the President was given power, "while the National Assembly is in recess" to "enact decrees having the force of law and to take decisions originally lying within the competence of the Assembly, should the necessity arise", such action to be submitted to the Assembly at its first meeting. The broad legislative powers conferred on the President were supplemented by the existence of authority already conferred upon him under the Egyptian Law on the State of Siege—(Sometime referred to in the legislative acts as "martial law".)

The "basic constituents" of the new system are thus expressed in the Constitution :—

> **Article 3 :** Social solidarity is the basis of the Society.
>
> **Article 4 :** National economy is organised according to plans which conform to the principles of social justice, and aim at the development of national productivity and the raising of the standard of living.
>
> **Article 5 :** Private property is inviolable. The law organises its social function. Property may not be expropriated except for purpose of public utility and in consideration of just compensation in accordance with the Law.
>
> **Article 6 :** Social justice is the basis of taxation and public imposts.

Early legislation quickly expressed the policy of the new Republic. The second law to be promulgated dissolved all political parties and organs existing in Syria, forbade the creation of new ones and transferred their property to the National

Union ; others decreed an amnesty for certain offences committed in Syria ; provided for the unification of the secretariats of the Presidency of the Republic and of the Syrian Council of Ministers ; decreed that until the formation of the National Assembly of the Republic, the former members of the Egyptian National Assembly and of the Chamber of Deputies should be charged with the execution of the work confided to them by the President of the Republic.

A few later laws of general interest may be noted ; a law (No. 54) unifying military ranks ; a law (No. 66) providing that until the unification of the laws on the subject, the physicians, pharmacists, dentists, nurses and midwives authorized to exercise their profession in Egypt or in Syria, shall have the right to exercise it in either of the two provinces ; a companion law (No. 67) authorizing the Minister of Hygiene in the provinces to name physicians, dentists, pharmacists, nurses and laboratory and X-ray assistants under certain conditions prescribed by the law ; and a law (No. 72) according customs exemption to citizens of the Republic moving from one province to another for purposes of taking up residence, provided that the objects involved shall have been in use and were in keeping with the social situation of the owner and not for commercial use. A Presidential Decree of June 17th, established the 18th of June as a national holiday to be known as the Evacuation Festival.

In the field of unification of the legislation of the two Provinces, plans were laid and separate commissions established covering the personal status of Muslims and of Non-Muslims ; the Civil Code, as to which the principal difficulty arose from the fact that Syria had adopted a system of land registration corresponding to the Torrens system ; the Commercial Code ; the Penal Code ; the Code of Procedure.

LEGAL NATURE OF THE UNITED ARAB REPUBLIC

While it is clear that the intention was to create a unitary and not a federal state, the question arises as to the relation of the two former independent States to the new political unit. (1)

(1) "The United Arab Republic, as a union of two wholly independent sovereign States, whereby each State surrendered its sovereignty to an entirely new unity has been termed unprecendented." I. Whiteman, p. 422.

Did the legal personalities of the former come to an end? Are we in the presence of a "Succession" by a new State to two previously independent States with all the legal consequences that must follow? Or have we here a special case—a situation *sui juris*, in which the legal personalities were in effect continued. Should the situation rather be regarded as one of "amalgamation" or "fusion", involving, it is true what appears to be a new international person but not necessarily being accompanied by the extinction of the two pre-existing persons.

This problem has been made the subject of an incisive examination by an English scholar, whose views, in which the present writer concurs, are in favour of the theory of fusion, (1) a theory which finds confirmation in the attitude taken by the United Nations both at the time of the creation of the U.A.R. and even more emphatically at the time of the withdrawal of Syria from the union three years later.

THE U.A.R. AND THE UNITED NATIONS

On February 24, 1958, the Government of the United Arab Republic addressed a Note to the Secretary General of the United Nations, advising him that the plebiscite of February 21, had made clear the will of the Egyptian and Syrian people to unite their two countries into a single State. The note observed :—

> "It is to be noted that the Government of the United Arab Republic declares that the Union henceforth is a single member of the United Nations, bound by the provisions of the Charter, and that all international treaties and agreements concluded by Egypt or Syria with other countries will remain valid within the regional limits prescribed on their conclusion and in accordance with the principles of international law."

In communicating this Note to the member nations, and advising them of the receipt of the credentials of Mr. Omar

---

(1) See E. Cotran, International and Comparative Law Quarterly, April 1959 —"Some Legal Aspects of the Formation of the United Arab Republic and United Arab States." pp. 346 et seq.

Loutfy as Permanent Representative of the United Arab Republic, the Secretary General of the United Nations observed :—

> "In accepting this letter of credentials, the Secretary General has noted that this is an action within the limits of authority, undertaken without prejudice to, and pending such action as other Organs of the United Nations may take on the basis of the notification of the Constitution of the United Arab Republic and the Note of March 1, 1958."

No objection having been made to the action of the Secretary General in thus accepting provisionally the credentials of Mr. Loutfy, membership of the new State in the United Nations was then tacitly accepted without recourse to the procedure prescribed in Art. 4 of the Charter for the admittance of new members. (A decision of the General Assembly upon recommendation of the Security Council.) This effective recognition of the composite character of the U.A.R. was followed by the subsequent relations between the new Republic and the various organs of the United Nations, such as the Trustee Council, the United Nations Conference on the Law of the Sea, the International Labour Organization, the World Meteorological Organization, the World Health Organization, the International Telecommunications Union, the United Nations Education, Scientific and Cultural Organisation, the International Monetary Pact, the International Civil Aviation Organization and the Universal Postal Union. (1)

The comment of Cotran on this situation is pertinent :—

> "It is clear from the above survey that the United Nations and the Specialised Agencies accepted without controversy the change of membership of Egypt and Syria to that of the U.A.R. The U.A.R. does not seem to have

---

(1) The position of the United States as declared in a note from the Acting Secretary of State to the United Nations Mission at the time of the Geneva Conference on the Law of the Sea, in 1958, was thus tersely expressed :— "The U.S. Delegation should take the position that it is a member. The U.A.R. is the product of a merger between Syria and Egypt, both of which were Charter Members of the United Nations. The U.A.R. is their successor and as such succeeds automatically to the membership in the United Nations and the specialized agencies of which either Egypt or Syria was a member." v. I. Whiteman Digest of International Law, p. 423.

> been considered by any of the organisations as a new member and, consequently, it was not required to file a formal application for membership. The manner in which international organizations treated the formation of the U.A.R. lends considerable support to the view that the process should be regarded as one of amalgamation rather than of succession. If the creation of the Union had raised an issue of succession, then previous practice suggests that the U.A.R. should have had to apply for membership of the United Nations in the usual way.

A confirmation of the hypothesis of "amalgamation" or "fusion" above, is seen in the attitude of the United Nations at the time of the withdrawal of Syria from the Republic in 1961 (v. infra).

TREATIES

As the new Republic was a single unified State and not a federation, it was a matter of course that the treaty-making power should reside in the central government. The question as to the effect upon existing treaties of the absorption of the two independent States into a new political unit, which might otherwise have given rise to interesting problems of international law, was specifically covered by the Constitution (Art. 69).

> "The coming into effect of the present Constitution shall not infringe upon the provisions and clauses of international treaties and agreements concluded between each of Syria and Egypt and the foreign powers. These treaties and agreements shall remain valid in the regional spheres for which they were intended at the time of their conclusion, according to the rules and regulations of International Law".

The situation was also covered in the declaration of the U.A.R. Government to the Secretary General of the United Nations, in its note of March 1, 1958, to the effect that "all international treaties and agreements concluded by Egypt or Syria with other countries, will remain valid within the regional limits prescribed in their conclusion and in accordance with the principles of international law."

As to the effect of such a declaration on the obligations of third parties to pre-existing treaties, questions might well have arisen. Primarily, the answer would depend on the extent to which the foreign power concerned had accepted the position of the U.A.R. as was apparently the case with the United States (1) No such questions, however, are known to have arisen.

This attitude of implied acceptance by foreign powers lends support to the theory of 'fusion' rather than of 'succession' since if it had been a question of "succession", such third states, on the traditional view, could have treated its declaration as *res inter alias acta.*

As to the territorial obligations assumed by the U.A.R. it would seem that since we are not in the presence of an annexation but of an incorporation, they would be limited to the territory of the State by which they were contracted. The statement made by an official of the American State Department to the writer of the article cited, confirms this conclusion :—

> "The United Arab Republic was under no obligation to assume greater international obligations under such treaties and agreements than existed at the time of the formation of the United Arab Republic. Therefore, the treaties and agreements of the United States with Egypt in force at the time of the formation of the United Arab Republic were considered as continuing to be applicable to Egyptian territory of the Republic while treaties and agreements of the United States with Syria in force at the time of the Republic's formation were considered as continuing to be applicable to Syrian territory of the Republic."

The writer of the article adds :—

> "The convention concerning customs facilities for touring, for example, is applicable to the Egyptian territory of the U.A.R. but not to the Syrian territory." (1)

In effect the treaty making power was frequently exercised and in a number of cases the new agreements were made applic-

---

(1) Bulletin Department of State. Vol. 38, No. 97777.

(1) Op. cit., p. 355.

able to only one or other of the two regions, as, for example, a treaty on the avoidance of double taxation applicable as between the region of Egypt and the German Federal Republic, and a money order agreement concluded with the United States.

As to the making of new treaties, Article 56 of the Constitution provided generally that treaties should be concluded by the President and communicated by him to the National Assembly, such treaties to have the force of law after their conclusion, ratification and publication. An exception, however, was made in the case of peace treaties, and treaties of alliance, etc., which, to become effective, would require ratification by the National Assembly.

SYRIA WITHDRAWS FROM THE U.A.R.

The year 1961 was marked by important developments in the constitutional history of the Republic. On August 16, announcement was made of the reorganisation of the administrative system, replacing the central and the two regional cabinets by a single cabinet for the whole U.A.R., the purpose being the achievement of greater unity a clearer fixing of responsibility and conferring on the public services greater capacity for the exercise of general control of the administrative system. (1)

These developments were followed by a revolution which took place in Syria on 26/28 September, resulting in the withdrawal of that country from the U.A.R. and its resumption of independence. The action was accepted by the United Arab Republic and its name was retained unchanged.

The withdrawal of Syria from the Union rendered the constitutional situation of the U.A.R. ambiguous. Steps were accordingly taken to regularize it. On June 30, 1962, an elaborate statement of general principles and purposes—upwards of a hundred pages, was adopted by a National Congress of Popular Forces in Cairo. This was followed by a Constitutional Proclamation "Organizing the Superior Political Powers of the State." The proclamation set-up in effect a presidential regime—a

(1) See A. A. Hatem, Minister of State for the U.A.R. "Al Ahram", Cairo, August 16, 1961.

President and two Councils, Presidential and Executive. The President as Head of the State was Commander of the Armed Forces and the spokesman of the State in all internal and external matters. With the approval of his Council he was given the power to conclude treaties and promulgate laws, and also to appoint and to dismiss ministers. To the Presidential Council was committed the higher policy of the State and the supervision of its execution. To the Executive Council, comprising its President and the Ministers, was confided the Supreme Executive and Administrative power. A final article provided that the provisions of the Provisional Constitution of 1958 should remain in force in so far as not in conflict with the Proclamation. This Declaration as also the Provisional Constitution, was terminated by the new U.A.R. Constitution of March 26, 1964. Art. 169 — See Documents.

Meanwhile, Syria on her part, took steps to resume its former position in the United Nations. On September 30, the new Syrian Prime Minister and Minister of Foreign Affairs of the Syrian Republic informed the President of the United Nations General Assembly that he had assumed office at noon the preceding day. On October 5, the President of the U.A.R. announced on the radio that his Government would not oppose the readmission of Syria to the United Nations. Three days later the Syrian Prime Minister cabled the President of the General Assembly, recalling the fact that Syria was an original member of the U.N. within the meaning of Article 3 of the Charter, and "continued its membership in the form of joint association with Egypt under the name of the Arab Republic." The message continued: "In assuming her former status as an independent State the government of the Syrian Arab Republic has the honour to request that the United Nations take note of the resumed membership in the U.N. of the Syrian Arab Republic" [1]. This position was promptly accepted by the United Nations. After consultation with numerous delegations the President declared before the General Assembly on October 13, that he had been led to believe that there was no objection

---

(1) U.N. General Assembly — A/CN. 141 149, 13 Dec. 1962.

on the part of any delegation to the request made by the Syrian Government, and that if no objection was received before the plenary session in the afternoon he would request the secretariat to take the necessary measures so that the Syrian Republic might take its seat in the General Assembly. No such objection having been received Syria resumed her full participation in the work of the Organization. Whatever legal objections may have existed to the procedure were effectively cured by the common consent of all parties.

CAUSES OF RUPTURE

While the political union which thus came to an untimely end was in the intention of its founders something much closer than a federation, the reasons which led to its break-up are of direct interest to any study of the federal experiment, since they point directly to dangers which might just as easily confront any other attempted form of union.

On the Egyptian side one of the most responsible Egyptian commentators, El Sayed Mohamed Hassanein Heikal, offers an authoritative interpretation of events and a vivid picture of the human side of the political struggle. Speaking first of general causes he observes :—

> "There should have been a solid and concrete ideological basis for this unity. There should also have been a strong economic basis for this unity. Furthermore, there should have been a strong social basis for such unity. All of this never existed, but what really existed was the pressure and threats which faced Syria at that time.
>
> At the time unity between Egypt and Syria was realised, Syria was subjected to pressure from two sides.
>
> 1. From the Baghdad Pact ; the Hashemite dynasty played the leading role in this respect ;
> 2. From the communists, who, at that time were led by the Syrian Communist Party which wanted to to make Syria a base of its operations in the Arab world.
>
> It became clear to the Syrian elements, which pressed for unity, that unless something happened from without, Syria would either fall in the grip of the Baghdad Pact or the Communists. This was the picture which the Army officers, the Party leaders, presented when they arrived in Cairo asking for full unity."

Passing in later articles to a review of actual negociations, the same commentator records an agreement reached by the officers of the Syrian Army that :—

> "The only solution and the only hope for Syria to survive is to join in a Union with Egypt."

and proceeds with the summary of events in Cairo leading to the final agreement :—

> "There were twenty-two officers, who represented twenty-two different blocs in the Syrian Army, and they all agreed on this solution.
>
> After having adopted this decision the officers boarded a plane and left for Cairo. They arrived in Cairo on January 14, 1958.
>
> The following day they had a meeting with the President and described to him how the Army was divided into blocs and how a state of permanent emergency prevailed at the barracks, with each faction afraid of the other.
>
> They described how they were subject to pressure from the Baghdad Pact and how the Communists attempted to infiltrate the key posts, and how Khaled Bakdash, leader of the Syrian Communist Party, made an arsenal of the Kurdish district in Damascus, which no stranger dared to approach.
>
> The twenty-two officers spoke, one after the other, and pressed for union, and after long hours of discussions, President Nasser said that he was ready to accept it in principle, on the three following conditions :—
>
> 1. A plebiscite is to be held on Union between Egypt and Syria.
> 2. The Syrian Parties are to suspend their activities and to dissolve.
> 3. The Army is to stop meddling in politics and devote all its efforts to the defence of the country."

Pursing his recollections a few months later the same observer, in a series of articles published in June, 1962, under the title "Are We Ready for a New Trial for Unity ?", examines the possibilities of a future union and expresses the Egyptian point of view in significant terms. He states clearly that the full merger between the two countries was premature and was only accepted by Egypt because of the critical political situation then existing in Damascus. According to him the development

of the new system of government clashed with several factors, the most conspicuous of which were :—

1. The absence of common borders between the two regions of the U.A.R.
2. The national feelings were not yet prepared for dissolution of national entity in the two religion.
3. The social revolution necessitated the elimination of feudalists and exploiting capitalists, which elements succeeded, at the time of crises, to stir up trouble and mix their personal interests with the interests of the country.
4. Because of the political circumstances under which the experience of unity took place, the U.A.R. was unable to give itself the revolutionary drive necessary to put an end to the currents which dominated Syria before the merger, and which were responsible first and foremost for the dangers which threatened the Syrian entity. These currents continued after the merger to exercise their activities of destruction and sabotage, hiding their personal and individual mistakes and exploiting their ambitions under cover of national tendencies.
5. All these circumstances made the establishment of a democratic popular organization a very difficult job although the experiment succeeded in its last days, through the socialist laws of July, in dealing a heavy blow to feudalism and exploiting capitalists, and in opening the door of true democracy which has no room for those class interests which stand against the will of the people.

The lessons learned from this past experience of unity makes it quite clear that any further attempt at unity must differ from the former picture of unity. For instance :...

The National entities should remain well-defined and clear within the framework of unity.

Each national unity should have its local government which is to be responsible before the elected popular authority.

Unity should be centralized in Defence and Foreign Affairs, and also in programmes of social reform which rest on socialism and democracy. Unity should also extend to curriculums and culture.

This united-state country should have one central parliament in which the national entities should be justly

> represented. The central government should be responsible before this parliament.
>
> The realisation of socialism and democracy should continue and with it the breaking down of class differences in the new Arab society ? which will gradually help to consolidate a consciousness of the need for Unity and, at the same time, will solve the problems of the minorities and other sectarian problems in some parts of the Arab Homeland.
>
> With respect to the plan of work, the U.A.R. places its charter at the disposal of the Arab Revolutionary movement.

As for future union the same writer lays as conditions, first, that the Syrian Government proves that it really represents the Syrian people, without any pressure regardless of its source ; second that it rejects any bargaining or party manœuvres which exploit the objectives of unity and favour personal interests ; and finally that it prove its good intentions by holding investigations into the unjust accusations levelled against Cairo in the wake of the reactionary secessionist coup. He adds that President Nasser himself had asked for the holding of such investigations in a statement addressed to the Arab Nation on October 5, 1961.

SYRIAN PROPOSAL FOR FUTURE UNION

As of significance in the matter of later developments the communiqué issued by the Syrian Government on October 10, 1961, is of interest. While employing the Arabic term generally used as the equivalent of federation, the statement would seem to have in view a somewhat looser grouping. It reads as follows :—

> "We call on all the Arab states to form a Federation based on the following principles :—
>
> 1. An All-Global Arab Federation with autonomous governments and constitutions united as equals but guaranteeing the national characteristics of each and solidarity between all.
> 2. Each State to have its own Legislative and Executive authorities and to enjoy the exercise of sovereignty within its own boundaries.

3. All Arab States members of the Federation are to be represented in a supreme federal legislative house with an equal representation for each State and this Federal House is to exercise sovereignty legislative authority over the whole Federation.
4. This House undertakes the formulation of a common policy in military and economic matters and a common foreogn policy enlarging its sphere according to the interests of the Federation and on an evolutionary basis.
5. A Supreme Executive for the Federation representing all members is to be instituted and is to be presided over either by the heads of Government or delegates every year in rotation.
6. Every State to keep its own army but a common army under a Common Command is to be created.
7. Each State undertakes not to interfere in the internal affairs of other members and other conditions."

THE DEBATE ON THE REASONS FOR THE BREAK-UP

In March 1963, during the negotiations that led to the drafting of the plan for a revised form of union the history of the break-up was reviewed, accompanied by a full and frank discussion of the reasons which had led to it. The minutes of these discussions were published in the leading Arabic newspaper and confirm in effect what has been stated above. The following points were particularly stressed.

Syria resented in particular the severe police measures that were prevailing, the dissolution of political parties and especially the Baath ; the pressure that was exercised for the creation of the new National Union, operating from Cairo and the domination of the Syrian Army by the new Egyptian officers transferred from Cairo, whilst influential and competent Syrian officers were delegated to Cairo in insignificant posts. Cairo, on the other hand, accuses the Baath of continuing its political activities even after its formal dissolution, being inspired by parochial and egoistical interests detrimental, not only to the Union, but subversive among the ranks of the Egyptian officers and Egyptian members of the Cabinet. Both parties agreed that the condi-

tions that prevailed on the eve of the Union and the dangers confronting Syria at the time, dictated the immediate action taken without the necessary preparations that were essential in the economic, social and cultural fields. Both agreed that for the proper functioning of a Union, a commission ad hoc for financial, trade, economic and social problems should be created with the purpose of examining the conditions in each country and endeavouring to harmonise and coordinate the activities in both countries in order to ensure the least possible dislocation and prejudice to the economy of either State even if the Union would thereby be compelled to wait longer for its completion in all domains.

The efforts made to resolve the misunderstandings and to find a more acceptable basis of union finally led to the taking of definite steps. On April 6, 1963, talks began in Cairo between three delegations representing the U.A.R., Syria and Iraq, and ended on the 17th with a declaration of agreement between them for the establishment of a Federal State, bearing as before, the name United Arab Republic. Three documents were signed by the delegations, namely :—

THE PROJECTED FEDERAL REPUBLIC

The Declaration of April 17 1963 [1]

1. A social and political pact presenting the social, economic and political principles agreed upon as basis of the Constitution of the New State ;
2. Appendix I — outlining the proposed Constitutional Organisation of the New State ;
3. Appendix II — comprising the Structural Organisation of the State and the relations between the three regions—the U.A.R., Syria and Iraq.

GENERAL PRINCIPLES

The first document deals in its preamble with the historical, ethnical and political ties that unite the three countries, speaking

(1) The review herewith presented as also the text published under 'Documents' is based on translations from the official Arabic text which in many respects differs from the English translation published by the Information Department of the Government in April 1963, which latter, inter alia, transposes the order of Appendix I and II. as given in the original Arabic text.

the same language, following the same creed and constituting during several centuries since the rise of Islam, a homogeneous and more or less united community. In summary it is as follows :—

Responding to the popular will of the three countries to lead a common life, they have agreed to pool their sovereignty into a single sovereign Federal State. This unity is, moreover a response to the challenge of Zionism, which has appropriated a territory belonging to the Arabs since immemorial times and has founded therein a community hostile to the Arabs, separating the component parts of the Arab World and forming a spring-board for further aggression. The basis of the new State is to be social justice for all, free and democratic institutions and representation of the whole community, thus uniting social liberty with political liberty and eliminating all sources of discord arising from class interests. A "front" comprising all progressive elements standing for the strengthening of the ties between the different regions and the implementation of the new social and democratic policy having as objectives economic development and equal opportunity for all, is to be formed as a unified front under a unified leadership. (These principles are in substance similar to those expressed in the National Charter adopted by the Congress of the Popular Forces of the U.A.R. in the summer of 1962).

A percentage of at least 50 % is to be guaranteed to the farmers and workers in all representative institutions on all levels, including the National Assembly. Popular organisations, cooperatives, trade unions and Youth and Feminist organisations are to assume an important role in strengthening democracy and guaranteeing an enlightened leadership. Capitalism in all its forms, even State capitalism, is condemned as leading to monopolistic interests tied to world monopolistic interests and leading to the exploitation of the mases. Communism is likewise condemned as being anti-God and foreign to a State whose religion is Islam and knows no discrimination between classes and refuses any dictatorship of a single class. Workers, however, are to be guaranteed a positive role in management and a sharing in the profits. As a socialist State, all means of production are to be socialised and directed according to a planning for the

welfare of the people. A common policy is to be adopted for taxation, tariffs and the setting up of a Common Market. A new Federal Agency is to be constituted for planning information and implementing a common policy in education and culture.

STRUCTURE OF PROPOSED FEDERATION

The structure of the proposed Federation (as developed in the Appendices and as it remained to be given definite form in the Constitution), emphasises its federal character as contrasted with the unitary nature of its predecessor. The nearest Arabic equivalent for the term 'federal' is used throughout. The purpose of the agreement is stated to be to create a 'federal state' on the basis of 'free federation between Egypt, Syria and Iraq.' The federation members are to be designated by the title of 'Region', whereas in the previous union each competent part was designated as a 'Province', the change being obviously intended to indicate the existence of a much more substantial measure of autonomy for the Regions. Another point of contrast, although of minor importance, is that Islam is to be declared the official religion of the State. This declaration did not appear in the earlier union.

The general structure of the State is that of a conventional Republic with a bi-lateral National Assembly composed of a Chamber of Deputies and a Federal Council. In the former the number of member is to be in proportion to the population of each Region, elected by free election and secret ballot for a term of four years. The Federal Council is to consist of an equal number of members from each region with a similar term of membership. The authority of the Federal Government is to cover an unusually wide range of subjects, *viz.*, foreign policy, defence, national security, finance and treasury (budget, customs, etc.), economic planning and development ; information and national guidance (on federal level) ; cultural planning ; co-ordination of general education, higher education and scientific research ; justice and co-ordination of laws ; federal communications and such other federal prerogatives as may be added, following a procedure to be defined in the Constitution.

Wide powers are also conferred on the head of the State—the President of the Republic—elected by the National Assembly for a term of four years. He appoints the Prime Minister and the Ministers who "enjoy the confidence" of the National Assembly and who hold office "as long as they enjoy the confidence

The judicial authority is to consist of "the Supreme Federal Court" and is to be established "in conformity with the provisions of the Constitution and in virtue of a federal law." The jurisdiction of the Court is to be determined in like manner. The question of constitutional review of legislation is not referred to.

The regional system of government follows the federal plan in establishing a Legislative Council, directly elected by secret ballot and a Regional President elected by the Legislative Council for a term of four years, the election to be approved by the President of the Republic under a procedure to be prescribed by the Constitution, as are also the attributes of the office. Each Region is to have its own Cabinet appointed by its President.

In the matter of amendment it is provided that the Federal Constitution may be amended by a majority of three quarters of the votes of each Council. In the case of the Regional Constitution amendment is to be had in similar manner but such amendments are not to come into effect except with the approval of the three quarters majority of the Federal Chamber of Deputies and Council.

TRANSITIONAL PERIOD

It was proposed that "a plebiscite on the Federal Constitution and the President of the Republic" should be held within five months of the date of the announcement (April 17, 1963), and that the organisation of the Federal State be completed within twenty months after the publication of the results of the plebiscite—thus ending the transition period.

During the transition period the legislative and executive authority of the Federal State was to be exercised by a Presidential Council under the direction of the President of the Republic, and to be formed of an equal number of members

from each of the Regions. The Council members were to be chosen by the legislative authorities of the Member States. During this period the Council was to plan the general policy of the State and to entrust the Cabinet with its execution. It was also to co-ordinate public services between Regions. Pending the holding of the plebiscite on the Federal Constitution, Member-States undertook the formation of a Unified Military Command, a Foreign Affairs Committee and Economic and Cooperation Committe, a Common Arab Market Committee and any other required committees "so that their formation and their starting of operations may pave the way for the real establishment of federal organisations when unity is ensured."

As to Treaties, it was proposed that they should be concluded by the two federal councils in the manner to be provided by the Constitution and the laws ; that agreements and treaties "which have been previously concluded by the governments of any region which has concluded them ;" that "federal laws will organise the continuation of certain cultural and trade affairs on a temporary basis." It is added that the regions "may conclude some trade agreements with the approval of the federal State,"—a proviso which presumably was not intended to relieve the Central Government from international responsibility.

Such, in brief, was the program proposed for the new State, an ambitious appeal to the principle of federation, which it was hoped to extend to other Arab States, an eventuality already foreseen in the case of the Yemen, as expressed in the joint Iraq-Yemeni Communiqué Broadcast of June 17, 1963, "Yemen wishes to join the union of Egypt, Syria and Iraq, when it is implemented and Iraq welcomes and supports this request ;" and in the similar provisions of the U.A.R.-Yemeni communiqué of the same date, stating that the U.A.R. welcomed and agreed to the request of Yemen to become a party to the three-power Federation (v. *Egyptian Gazette*, June 18, 1963).

Unfortunately, however, new clouds began to gather on the horizon announcing a thunderstorm that eventually broke with the sad consequence of temporarily at least menacing the carefully planned edifice.

During the talks between the three delegations it had been agreed that a common political organ was to be formed in

the three countries uniting all existing parties that stood for unity and socialism. Such a party with a central administrative organ was intended to be the backbone of the new federal state and, as such, to enjoy exclusive political activities. It appears, however, that the Baath Party in Syria was not prepared to share authority with other unionist parties. On the other hand, a strong current of opinion was revealed in Syria in favour of the immediate joining up with Egypt, a line of action that was evidently unpalatable to the ruling party in Syria and Iraq. An unsuccessful *coup d'etat* in July, was destined to put into effect this plan and was followed by indiscriminate and cruel purges of all dissenting parties, leaving the Baath as the only legal party in Syria. The reaction of Egypt was, as to be expected unfavourable, President Nasser insisting that the policy adopted by the Baath in Syria was a violation of the pledges formally given during the talks and threatening to denounce the agreement unless a sane policy of collaboration with other unionist parties was restored. The continuation of the purge on a wider scale led to the official denunciation by President Nasser of the whole agreement in a speech delivered on the anniversary of the Republic. Efforts to find a remedy to the deteriorating situation were of no avail notwithstanding a visit by President Aref of Iraq .

In the meantime, both Syria and Iraq continued to reiterate their attitude of upholding the principles agreed upon and attributing to Egypt responsibility for the withdrawal. Pursuing their common policy, they signed a military agreement and embarked on the negotiation of a dual political union. These negotiations, however, were interrupted by new and unexpected events threatening to lead to further complications. On the 13th of November, 1963, following a divergence of views between the left wing of the Baath party in Iraq, four of the leading dissentists, some of whom were members of the Cabinet, having at their head the Vice-Premier, were arrested and flown to Madrid under military guard. Shortly afterwards, following a coup staged by a party Militia which was formed by the Vice-Premier and to whom it owed its allegiance, their adversaries in the party suffered the same fate with a different destination—namely Beirut. Fighting began in the streets of Baghdad between the Baath Militia and the Army and finally the revolt

was crushed, order was restored, and the army under President Aref, took over. A new Revolutionary Council, comprised of divisional commanders under the Chairmanship of the President has been formed, with a new Cabinet comprising some members of the former one and a new Consultative Council. The reaction in Cairo to the new Regime has been very favourable.

Syria too, was present at both the Summit and the Merger Day Celebrations held in Cairo in 1963 and 1964 and while it is not likely that any form of political association will be possible during the ascendancy of the present Baath regime, the common agreement on broader principles of union, attested by its presence at these meetings suggests that, eventually, Syria will again find a place in some more realistic form of common accord with its former partner, the U.A.R. Such a trend is reflected in the new provisional constitutions of both countries (U.A.R. March 1964, Syria April 1964). The estrangement between Syria on one side and Iraq and the U.A.R. on the other is gradually being resolved.

Thus, once more, we are in presence of a setback for an ambitious and genuine plan of collaboration in a part of the world inhabited by the same ethnic group, speaking the same language, having a common religion and following the same way of life. Such failure must find its explanation in more serious reasons than quarrels between political parties. The desires expressed by the masses in these countries for a common Government have failed to find the proper statesmanship capable of realising their legitimate and pressing demands. New channels of agreement will have to be explored and where agreement in the political fields have failed it seems reasonable to hope that a less ambitious one, limited for the time being to the economic domain, may lead in the end to the unity so much desired by the people.



UNITED ARAB REPUBLIC

Documents

NOTE

The Provisional Constitution and the Constitutional Proclamation were both terminated by the provisions of the final article, No. 169, of the Constitution of March 23, 1964, reading as follows :—

Article 169.—The application of the Provisional Constitution issued on the 13th day of the month of Shaaban of the year 1377 of the Hejira, corresponding to March 5, 1958 ; and the Constitutional Declaration on the political organisation of the higher authorities of the State, issued on the 28th day of the month of Rabi of the year 1382 of the Hejira, corresponding to September 27, 1962, shall lapse.

CONTENTS

PROCLAMATION OF THE UNITED ARAB REPUBLIC

On February 1, 1958, in a historic session held at Kubbah Palace in Cairo, His Excellency President Shuky El-Kuwatly of Syria, and President Gamal Abdel-Nasser, of Egypt, met the representatives of the Republics of Syria and Egypt, El-Sayed Sabry El-Assaly, El-Sayed Abdel-Latif El-Baghdady, El-Sayed Khaled El-Azm, El-Sayed Zakaria Mohieddin, El-Sayed Hamed El-Khoga, El-Sayed Anwar El-Sadat, El-Sayed Fakher El-Kayyaly, El-Sayed Maamoun El-Kozbary, El-Sayed Hussein El-Shaffei, El-Sayed Assaad Haroun, General Abdel-Hakim Amer, El-Sayed Salaheddin El-Bitar, El-Sayed Kamaledine Hussein, El-Sayed Khalil El-Kallas, El-Sayed Noureddin Tarraf, El-Sayed Saleh Akeil, El-Sayed Fathy Radwan, General Afif El-Bizry, El-Sayed Mahmoud Fawzy, El-Sayed Kamal Ramzi Stino, El-Sayed Aly Sabri, El-Sayed Abdel-Rahman El-Azm and El-Sayed Mahmoud Riad.

The purpose of this meeting was to discuss the final measures to be taken for the realisation of the Arab peoples' will, and the execution of what the Constitutions of both republics stipulate, namely that the people of each of them form a part of the Arab Nation. They, therefore, discussed the decisions unanimously approved by the National Assembly of Egypt and the Syrian House of Representatives that unity should be established between the two countries as a preliminary step towards the realisation of complete Arab unity. They also discussed the clear signs manifest in the past few years, that Arab nationalism was the inspiring spirit that dominated the history of Arabs in all their different countries, their common present and the hoped-for future of every Arab.

They came to the conclusion that this unity which is the fruit of Arab nationalism is the Arabs' path to sovereignty and freedom, that it is one of humanity's gateways to peace and co-operation, and that it is therefore their duty to take this unity with persistence and determination staunch and unwavering, out of the circle of wishes and aspirations to where it can be converted into a reality. They came out of this with the conviction that the elements conducive to the success of the union of

the two republics were abundant, particularly after their recent joint struggle—which had brought them even closer to one another—and had made the meaning of nationalism considerably clearer and stressed the fact that it was a movement for liberation and that it was a faith in peace and cooperation.

For all this, the participants declare their total agreement, complete faith and deeply rooted confidence in the necessity of uniting Egypt and Syria into one State to be named "The United Arab Republic".

They have likewise decided to declare their unanimous agreement on the adoption of a presidential democratic system of government for the Arab Republic. The executive authority shall be vested in the Head of the State assisted by the ministers appointed by him and responsible to him.

The legislative authority shall be vested in one legislative house. The new republic shall have one flag, one army, one people who shall remain joined in a unity where all will share equal rights and duties, where all will call for the protection of their country with heart and soul, and compete in the consolidation of its integrity and the insurance of its invulnerability.

His Excellency President Shukry El-Kuwatly and President Gamal Abdel-Nasser will each deliver a statement to the people in the Syrian and the Egyptian Parliaments respectively on Wednesday, February 5, 1958 in which they will announce the decisions reached in this meeting and explain the principles of the unity on which this rising young republic shall stand.

The peoples of Egypt and Syria shall be called upon to participate in a general plebiscite on the principles of this unity and the choice of the Head of the State within thirty days.

In proclaiming these decisions, the participants feel great pride and overwhelming joy in having assisted in taking this positive step on the road to Arab unity and solidarity—a unity which had been for many an epoch and many a generation the Arabs' much cherished hope and greatly coveted objective. In deciding on the unity of both nations, the participants declare that their unity aims at the unification of all the Arab peoples and affirm that the door is open for participation to any Arab

State desirous of joining them in a union or federation for the purpose of protecting the Arab peoples from harm and evil, strengthening Arab sovereignty, and safeguarding its existence.

May God protect this step we have taken and those which are to follow with His ever vigilant care and benevolence so that the Arab people under the banner of unity may live in dignity and peace.

THE PROVISIONAL CONSTITUTION OF THE UNITED ARAB REPUBLIC

March 5, 1958

PART I

THE UNITED ARAB STATE

Art. 1. — The United Arab State is a democratic, independent, sovereign Republic, and its people are part of the Arab Nation.

Art. 2. — Nationality in the United Arab Republic is defined by law Nationality of the United Arab Republic is enjoyed by all bearers of the Syrian or Egyptian nationalities; or who are entitled to it by laws or statutes in force in Syria or Egypt at the time this Constitution takes effect.

PART II

BASIC CONSTITUENTS OF THE SOCIETY

Art. 3. — Social solidarity is the basis of society.

Art. 4. — National economy is organised according to plans which conform to the principles of social justice, and aim at the development of national productivity and the raising of the standard of living.

Art. 5. — Private property is inviolable. The law organises its social function. Property may not be expropriated except for purposes of public utility and in consideration of just compensation in accordance with the law.

Art. 6. — Social justice is the basis of taxation and public imposts.

PART III

PUBLIC RIGHTS AND OBLIGATIONS

Art. 7. — All citizens are equal before the law. They are equal in their rights and obligations, without distinction of race, origin, language, religion or creed.

Art. 8. — No infraction and no punishment may be imposed except by virtue of the law. Penalties may not be inflicted except in respect of offences committed subsequently to the date of the law prescribing them.

Art. 9. — The extradition of political refugees is prohibited.

Art. 10. — Public liberties are guaranted within the limits of the law.

Art. 11. — Defence of the Fatherland is a sacred duty, and the fulfilment of military service is an honour for all citizens. Conscription is obligatory in accordance with the law.

PART IV

THE SYSTEM OF GOVERNMENT

Chapter I

Head of the State

Art. 12. — The President of the Republic is the Head of State. He exercises his powers in the manner prescribed by this Constitution.

Chapter II.

The Legislature

Art. 13. — The legislative power is vested in an Assembly named the National Assembly. The number of the members of the National Assembly and their choice are determined by Presidential Decree. At least half of the number of members must be members of the Syrian Chamber of Deputies and the National Assembly of Egypt.

Art. 14. — The National Assembly exercises control over the acts of the Executive in the manner prescribed by this Constitution.

Art. 15. — To be a member of the Assembly, a person must not be less than thirty years of age according to the Gregorian Calendar.

Art. 16. — The National Assembly has its seat in Cairo. It may be convened elsewhere upon the demand of the President of the Republic.

Art. 17. — The President of the Republic convokes the Assembly and declares the closure of its session.

Art. 18. — Meetings of the National Assembly without summons, and outside its sessions, are null and void, and decisions taken therein are null and void, according to the law.

Art. 19. — Before admission to the exercise of their functions members of the Assembly shall take the following oath before the Assembly in public session :

> "I swear in the name of Almighty God to preserve faithfully the United Arab Republic and its Regime, to watch over the interests of the People and integrity of the Fatherland, and to respect the Constitution and the Law."

Art. 20. — The Assembly shall elect a President, and two Vice-Presidents at the first ordinary meeting.

Art. 21. — Meetings of the Assembly are public. Nevertheless, the assembly can meet in camera following the demand of the President of the Assembly or 20 of its members. The Assembly decides thereafter whether the discussion of the question under consideration should or should not be resumed in a public or secret session.

Art. 22. — No law may be enacted unless approved by the Assembly. No draft law may be adopted unless a vote is taken on each of its articles separately.

Art. 23. — The Assembly draws up its own internal regulations determining the manner in which it exercises its powers.

Art. 24. — Every member of the National Assembly is entitled to address to the Ministers questions or interpellations. Interpellations may not be discussed until after at least seven days from the date of their presentation, except in the case of urgency and with the consent of the Minister concerned.

Art. 25. — Any twenty members of the National Assembly may ask for the discussion of a general question with a view to ascertaining the Government's policy and exchanging views on such a question.

Art. 26. — The National Assembly may express its wishes and proposals to the Government regarding several questions.

Art. 27. — No tax impost may be established, modified or abolished except by a law. No-one may be exempted therefrom except in the cases specified by the law.

No other tax or duty may be exacted except within the limits defined by the law.

Art. 28. — The law defines the basic rules of the collection of public revenues and the manner of their expenditure.

Art. 29. — The Government may not contract any loans, nor undertake any project which would be a burden on the State Treasury over one or more future years, except with the consent of the National Assembly.

Art. 30. — No monopoly may be granted except by law and for a limited duration.

Art. 31. — The law prescribes the manner of the preparation of the budget, and its presentation to the National Assembly.

Art. 32. — The project of the State's General Budget must be submitted to the National Assembly for its examination and approval at least three months before the end of the financial year. Each section of the Budget must be voted separately.

The National Assembly may not introduce any amendments to the draft budget except with the approval of the Government.

Art. 33. — Every transfer of funds from one section of the Budget to another must be approved by the National Assembly, as well as any expenditure for which no provision is made therein or exceeding the budgetary allocations.

Art. 34. — The provisions relating to the Budget of the State are applicable to independent or annexed budgets.

Art. 35. — The law determines the rules regarding the budgets of other public institutions.

Art. 36. — No member of the National Assembly may, during the session, be subject to a criminal prosecution without

the permission of the Assembly, except in cases of *in flagrante delicto.*

The Assembly must be given notification on any case where prosecution is undertaken while the Assembly is in recess.

Art. 37. — No member of the National Assembly may be deprived of his mandate except by a decision of a two-thirds majority of the Assembly, upon a proposal of twenty of its members, and this on the ground of loss of confidence.

Art. 38. — The President of the Republic has the right to dissolve the National Assembly. In this case, a new Assembly must be formed and convened within a period of sixty days from its dissolution.

Art. 39. — When the National Assembly declares a vote of no confidence in a Minister, he must resign.

A motion of censure concerning a Minister may not be submitted to the Assembly until after an interpellation has been addressed to him. Such a motion must be proposed by twenty members of the Assembly. No decision may be taken before at least three days from the date of the presentation of the motion.

Withdrawal of confidence must be pronounced by the majority of the members of the Assembly.

Art. 40. — No one may at the same time be a member of the National Assembly and the holder of a public function. The law determines the other cases of incompatibility of functions.

Art. 41. — No member of the National Assembly may be appointed to the board of a company during the period of his mandate except in the cases prescribed by the law.

Art. 42. — No member of the National Assembly may, during the period of his mandate, acquire or take or lease any State property, or lease, sell or exchange to or with the State any part of his property whatsoever.

Art. 43. — Members of the National Assembly receive a remuneration prescribed by the law.

Chapter III

The Executive

Art. 44. — The executive power is vested in the President of the Republic, and he exercises it in the manner prescribed by the Constitution.

Art. 45. — The President of the Republic may not, during his term of office, exercise a liberal profession or undertake any commercial, financial or industrial activity. Nor may he acquire or take or lease any property belonging to the State, or lease, sell or exchange to or with the State any part of his property whatsoever.

Art. 46. — The President of the Republic may appoint one or more Vice-Presidents, and may relieve them of their posts.

Art. 47. — The President of the Republic appoints the Ministers and discharges them from their functions. Ministers of State, and Secretaries of State may be appointed. Each Minister supervises the affairs of his Department, and executes the general policy drawn up by the President of the Republic.

Art. 48. — A Vice-President and a Minister may not, during his tenure of office, exercise a liberal profession, engage in commercial, financial or industrial activities, nor may he acquire or take on lease any property belonging to the State, or lease, sell or exchange any part whatsoeevr of his own property to, or with the State.

Art. 49. — The President of the Republic and the National Assembly have the right to bring a Minister to justice for infractions committed by him in the exercise of his functions. The indictment of a Minister by the National Assembly is effected by a proposal submitted by at least one-fifth of the members of the Assembly. Such indictment must be approved by a majority of two-thirds of the members of the Assembly.

Art. 50. — The President of the Republic has the right to initiative laws, to oppose and to promulgate them.

Art. 51. — If the President of the Republic opposes a draft law, it is sent back to the National Assembly within the thirty days following the date of its communication to him.

If it is not referred back to the Assembly within this period, it is considered law and promulgated.

Art. 52. — If a draft law is referred back to the Assembly within the prescribed time, and is voted a second time by a majority of two-thirds of its members, it is considered law and promulgated.

Art. 53. — While the National Assembly is in recess, the President of the Republic may enact decrees, having the force of law, or take decisions originally lying with the competence of the Assembly, should the necessity arise. Such decrees and decisions must be submitted to the National Assembly at its first meeting. If, however, the Assembly opposes them by a two-thirds majority, they are no longer effective from the day of their opposition.

Art. 54. — The President of the Republic enacts the regulations necessary for the organisation of the public service departments and supervises the administration thereof.

Art. 55. — The President of the Republic is the Supreme Commander of the Armed Forces.

Art. 56. — The President of the Republic concludes treaties and communicates them to the National Assembly. Such treaties will have the force of law after their conclusion, their ratification and their publication in conformity with the rules in force.

However, peace treaties, treaties of alliance, commercial and navigational treaties as well as all treaties entailing territorial changes or affecting the rights of sovereignty, or those involving expenditure by the Public Treasury for which no provision is made in the Budget, will not become effective until after ratification by the National Assembly.

Art. 57. — The President of the Republic may declare a state of emergency.

Art. 58. — The United Arab Republic consists of two regions: Egypt and Syria. In each, there shall be an executive council appointed by Presidential decree. This executive council has the competence to examine and study matters pertaining to the execution of the general policy in the region.

Chapter IV

The Judicature

Art. 59. — Judges are independent. They are, in the administration of Justice, subject to no other authority save that of the law. No power in the State may interfere in lawsuits or in the affairs of justice.

Art. 60. — Judges are irrelievable, in the manner prescribed by law.

Art. 61. — The law organises the various jurisdictions and determines their attributions.

Art. 62. — Sessions of the Courts are conducted in public, unless a court decides, in the interests of public order or morality, to sit in camera.

Art. 63. — Judicial decisions are pronounced and executed in the name of the Nation.

PART IV

GENERAL RULES

Art. 64. — Cairo is the capital of the United Arab Republic.

Art. 65. — The law determines the national flag and the regulation relative thereto.

The law also determines the State emblem and the regulations relative thereto.

Art. 66. — The law only legislates post-operatively ; it has no retroactive effect. Nevertheless, provisions to the contrary may be stipulated in a law except in felonies with the approval of the majority of the members of the National Assembly.

Art. 67. — Laws are published in the Official Gazette within two weeks from the date of their promulgation, and come into force ten days thereafter. Nevertheless this time may be extended or curtailed by a special provision in the law.

PART V

INTERIM AND FINAL RULES

Art. 68. — All laws, decrees and regulations in force in each of the two regions of Egypt and Syria at the time this Constitution comes into effect shall remain valid within the regional spheres for which they were intended. These laws, decrees and regulations may, however, be abrogated or amended according to the procedure established in the present Constitution.

Art. 69. — The coming into effect of the present Constitution shall not infringe upon the provisions and clauses of the international treaties and agreements concluded between each of Syria and Egypt and the foreign powers.

These treaties and agreements shall remain valid in the regional spheres for which they were intended at the time of their conclusion, according to the rules and regulations of the International Law.

Art. 70. — A special budget, alongside the State Budget, shall be drawn up and put in force in each of the present regional sphere of Syria and Egypt until the coming into effect of the final measures for the introduction of a single budget.

Art. 71. — The public services and administrative systems existing at the time the present Constitution comes into effect shall remain in force in both Syria and Egypt until their reorganisation and unification by Presidential Decree.

Art. 72. — Citizens shall constitute a National Union to work for the realisation of national aims and the intensification of the efforts for raising a sound National structure, from the political, social and economic viewpoints. The manner in which such a union is to be formed shall be defined by Presidential Decree.

Art. 73. — The present provisional Constitution shall be in force until the announcement of the people's approval of the final Constitution of the United Arab Republic.

Issued on Wednesday, March 5, 1958.

Gamal Abdel Nasser

CONSTITUTIONAL PROCLAMATION ORGANIZING THE HIGHER POLITICAL POWERS OF THE STATE

27 September 1962

Official Journal 222

In the name of the People

The President of the Republic

In the presence of the Provisional Constitution of March 5, 1958

In conformity with the National Charter and the decision of the National Congress of Popular Forces ratifying the same;

Pending the promulgation of the Definitive Constitution of the United Arab Republic

Proclaims the following organization of the higher political powers of the State.

I. ORGANIZATION OF THE HIGHER POLITICAL POWERS OF THE STATE

1. The higher powers of the State are:

a) The Head of State is the President of the Republic who is President of the Presidential Council and of the Council of National Defence.

b) The Presidential Council. This high institution of State authority shall exercise the prerogatives indicated in this Proclamation.

c) The Executive Council. This high institution of State, executive and administrative, exercises its prerogatives in accordance with the law and the decisions of the Presidential Council.

II. THE PRESIDENT OF THE REPUBLIC

2. The President of the Republic is the Head of the State. He is Commander in Chief of the Armed Forces and represents the State both at home and abroad.

3. The President of the Republic concludes treaties and promulgates the laws and decrees approved by the Presidential Council.

4. The President of the Republic with the approval of the Presidential Council names the President of the Executive Council and the Ministers and Vice Ministers, and relieves them of their office. Their nomination shall be upon presentation of their candidacy by the President of the Republic.

5. The President of the Republic, with the approval of the Presidential Council nominates the members of the Council of National Defence as well as the Deputy of the Supreme Commander of the Armed Forces. Their nomination shall take place upon presentation of their candidacy by the President of the Republic.

6. The members of the Presidential Council, the President of the Executive Council and the Ministers and Vice Ministers shall take the following oath before entering into office :

> "I swear by Almighty God to loyally defend the Republican Regime, to respect the Constitution and the Law and to scrupulously protect the interests of the People."

7. The President of the Republic convokes the Council of the Republic and the Executive Council for the consideration of all important questions.

III. PRESIDENTIAL COUNCIL

8. The approval of the Presidential Council shall be required for all matters and projects which the Provisional Constitution, the laws and the decrees, place within the competence of the President of the Republic, with observance

always of the provisions of the present Proclamation. It may confide to the Executive Council the various prerogatives mentioned in such laws and decrees.

9. The Presidential Council approves the high policy of the State in all its aspects, political, economic, social and administrative, and exercises surveillance over the execution thereof.

10. The Presidential Council names committees of inquiry and control. All the organs of the State shall collaborate with such committees in the performance of their missions.

11. The Presidential Council shall exercise control over the work of the Executive Council and sanction its decisions. It annuls or modifies such decisions in accordance with the provisions of the law.

12. The Presidential Council, with the approval of the President of the Republic, may dismiss its members from their office or add new members.

IV. EXECUTIVE COUNCIL

13. The Executive Council is the supreme executive and administrative organ of the State. It comprises the President of the Executive Council and the Ministers.

14. The Executive Council is responsible to the Presidential Council. It shall present thereto periodic reports on the activities of the various organs of the State.

15. The Executive Council shall give execution to the general policy of the State in accordance with the laws and decisions of the Presidential Council. To this end it shall enjoy all necessary prerogatives.

16. The Executive Council adapts and directs the activities of the Ministries, Administrations, Institutes, Institutions, and Organisations, with a view to the carrying into effect of the policies of the State.

17. The Executive Council: *(a)* Promulgates administrative and executive decisions in accordance with the laws and

decrees and supervises their application ; (*b*) Elaborates the projects and laws and decrees to be submitted to the Presidential Council ; (*c*) Names and revokes public officials in conformity with the law ; (*d*) Prepares the general objectives of the State ; (*e*) Outlines the general plan of government, prepares projects and laws relating to the national economy and takes the necessary measures for their application ; (*f*) Controls the organisation and the direction of operations of exchange, credit and state insurance ; (*g*) Concludes agreements for the borrowing and loan of money within the limits of general policy of the State and with the approval of the Presidential Council ; (*h*) Supervises the activity of public organs.

18. The Executive Council shall exercise control over the activities of ministries, administrations and public and local organs. It may annul or modify decisions which are not in conformity with the law.

19. The organs of control and inspection of the State shall be directly subject to the authority of the President of the Executive Council.

V. TRANSITORY DISPOSITIONS

The provisions of the Provisional Council shall remain in force in so far as they are not in conflict with the present Proclamation, pending the promulgation of the definitive Constitution of the State.

DECLARATION OF THE UNION AGREEMENT

April 17, 1963

English translation as issued by the Information Department, U.A.R. — Cairo, April 1963.

In the name of God, the All Merciful, the Compassionnate ;

In the name of the Arab people ;

Delegations representing the United Arab Republic, Syria and Iraq met in Cairo. In response to the will of the Arab people of the three countries and of the greater Arab Nation, fraternal talks between the three delegations began on Saturday, 6th April (Nisan) and ended on Wednesday, 17th April (Nisan), 1963.

Throughout their talks, the delegations were inspired by their faith that Arab unity is an inevitable objective which derives its makings from a common language, which is the carrier of culture and thought, a common history, which is the maker of sentiment and conscience, a common popular struggle, which determines and shapes destiny, common spiritual and human values emanating from the messages of heaven, and common social and economic concepts based on freedom and socialism.

The delegations took as guidance the popular will of the Arab people demanding unity, struggling to achieve it, and sacrificing to protect it and safeguard it, realizing that the nucleus of a strong unity is composed of the unification of the parts of the homeland which have achieved their liberty and independence and in which have arisen nationalist progressive risings determined to destroy the alliance between feudalism, capitalism, reaction and imperialism and to liberate the working force of the people to raise their alliance and express their true will.

The July 23 Revolution was a historic turning point in which the Arab people of Egypt discovered themselves, regained their will and thus pursued the road of liberty, Arabism and unity. The revolution of Ramadan 13 showed the true Arab

face of Iraq and lit its road towards the horizons of unity sought by the dedicated members of the July 14 revolution.

The March 8 revolution restored Syria to the unity caracvan which had been destroyed by the reactionary separation, after this revolution had destroyed the obstacles determinedly stacked by reaction and imperialism on the unity road.

Rendez-Vous of the Three Revolutions

The three revolutions got together at a meeting-point which reaffirmed that unity is a revolutionary act which derives its concepts from the faith of the masses, its strength from their will and its aims from their aspirations to freedom and socialism.

Unity is revolution—a revolution because it is popular and progressive and because it is a strong surge forward with the tide of civilisation.

Unity and the Palestine Problem

Unity is particularly so because it is deeply connected with the cause of Palestine and the national duty to liberate it. It was the Palestine disaster which exposed the conspiracies of the reactionary classes and the treacheries of the subservient, populistic parties and their betrayal of the people's aims and aspirations. It was that disaster which laid bare the weakness and backwardness of prevailing economic and social systems. It was that disaster which exploded the revolutionary energies of the masses of our people and sparked the spirit of rebellion against imperialism, injustice, poverty and backwardness. It was that disaster which pointed the way to the road of salvation, the road of unity, freedom and socialism. The delegations had all this in mind during their talks. While unity is a sacred objective, it is also the weapon of the popular struggle and the means for realisation of its major aims of freedom, security, liberation of all parts of the Arab Nation, establishment of a society based on sufficiency, justice and socialism, continuation of the revolutionary tide without deviation or release and its extension to embrace the greater Arab Nation, and contribution to the progress of human civilisation and consolidation of world peace.

Our Unity is Genuine

It has been agreed that the Arab Nation is determined that the unity between the three regions should be based on democracy and socialism and that it be a real and solid unity taking into consideration the particular ties of every region thus strengthening the bonds of unity on a foundation of realistic understanding and eliminating all elements of separatism and thus turning the strength of each state into the strength of the federal nation and the Arab Nation, and the strength of the federal state into strength for each region and consequently for the Arab Nation as a whole.

The three delegations declare in the name of the Arab peoples in Egypt, Syria and Iraq the will of these people to establish federal unity on the following basis :

FIRST : The Field of National Action :

The drafting of a Charter for National Action in which are included all the popular progressive and unitary forces and which will define its principles, aims, social philosophy and will be a basis for its cooperation and unity.

The liberty to form popular organizations in member regions so that the free popular will can find an organized means of self expression—all this within the framework of a political front comprising these popular organizations.

Also the unification of political leaderships on the federal level to guarantee the coordination of the activities of popular organizations and their unification since the unity of political action and popular struggle are the guarantee of the protection, solidarity and development of unity.

SECOND : The Foundation of the State :

Strengthening federal organs in the construction of the State to stress its capacity to plan, coordinate and execute and to guarantee its efficiency to express the genuineness of unity.

This can be achieved by : a common external policy expressed by a single international body—that is the Federal State facing imperialism inside and outside the Arab Nation, and a

united effort championing the freedom of the people and consolidating world peace.

The realisation of a single military unity capable of liberating the Arab Nation from the peril of Zionism and imperialism and achieving its aim in security, stability (the mobilisation of its forces to attain righteousness), justice and peace.

Unification of the organs of planning to direct the potentialities of the federal nation towards economic and social development and to exploit all its images and forces for the best interests of a community of affluence, justice and socialism ; the devoting of maximum attention to the affairs of education, scientific research, culture and information, in order to develop revolutionary consciousness and to place science at the service of society and to entrench progressive concepts and the definition of new values, working to spread national consciousness to all parts of the Arab Nation.

The mission of a federal state should be the drafting of certain fundamental rules which chart its path of development and growth, draw up its revolutionary, progressive programme in all political, social and economic fields and interpret the true expression of this historic stage through which the Arab Nation is passing.

Therefore the delegations hereby declare their complete agreement that the Federation, with its political, social and economic values and with its constitution and constitutional organs, shall take the following general form which sets the main lines of the National Action Charter and the Constitution of the Federation.

POLITICAL BASIS

Unity of aim and values and principles requires all unionist, socialist and democratic forces in each of the three regions of the Federation to form a political front bound by a Charter for democratic, socialist and unionist action with the purpose of unifying political action in the region and developing the revolutionary incentives of the masses in their quest for a better life in which efforts are made to raise its present standard to a higher level conforming to its aspirations as well as to pool their

efforts in a single political organization bound by the National Action Charter. In so doing, they shall be bound by the majority decisions of this political organization in order that they may, at this level, personify the unity of their will and be able to undertake their responsibilities and discharge their duties.

Single Political Leadership

On the level of the Federation a unified political leadership is to be formed, which will lead and unify political action in the Federation within the framework of this Charter. Political fronts in the regions or unified organizations within them are bound by decisions of the federal leadership issued by a majority vote. This leadership will gradually elaborate a unified political organization that will lead national political action both within and outside the Federal State, and will work to mobilize popular forces to impose its will and to constantly lead towards new horizons. But this does not mean the dissolution of existing unionist parties.

Democracy and Socialism as Bases of the Community

Political action is not only the leadership of the masses but also the strengthening of the foundations of our society on the basis of socialism and democracy emanating from our particular conditions of life and which is an expression of our future.

Democracy is assuring the sovereignty of the people and placing full authority in their hands and dedicating them to the realization of their aims.

Socialism is the true expression for making unity a progressive action—in other terms the establishment of a society of sufficiency and justice, of work and equal opportunity, a community of production and social services.

Democracy is political liberty and socialism is social liberty and they cannot be separated. They are the two wings of true liberty and without them, or without either of them, liberty cannot fly towards the horizons of the anticipated future.

Political democracy cannot be achieved in the shadow of reaction and cannot be realized in the shadow of the dictatorship of a single class.

Therefore the alliance between feudalism and capitalism must surrender and be replaced by the democratic alliance of the working forces of the people—farmers, workers, intellectuals, soldiers and national capitalism ; taking into consideration that this alliance is the legal substitute for the former reactionary alliance, and is alone capable of replacing reactionary democracy by true democracy.

Sovereignty of the People

Sovereignty in the United Arab Republic is for the people ; liberty, all liberty, is for the people and there is no liberty for the enemies of the people.

The enemies of the people include the following elements :

a) Those politically isolated according to appropriate laws.

b) All those tried by the revolutionary court and convicted of being a separatist, a conspirator or an exploiter.

c) All who have dealt or have dealings in the future with foreign political agents, thus becoming an agent of of foreign powers.

d) All who have worked or work for the purpose of imposing the domination of a single class.

Workers and Farmers to Occupy One Half of Seats in Political and Popular Organizations

Political and popular organizations which are based on free and direct elections must represent rightfully and justly the forces composing the majority. Thus we must guarantee to the workers and the farmers at least half the seats in these organizations and at all their levels including the National Assembly. This, besides being just and a true representation of the majority, is a firm guarantee of the force of the revolutionary drive. Thus the authority of elected popular assemblies is continuously confirmed as superior to the authority of the executive and administrative machinery of the State, and the people will always remain the leaders of national action. Also, local gov-

ernment must always and persistently be transferred gradually and whenever possible to popular assemblies which are more capable of feeling the problems of the people and solving them.

Collective leadership on all levels of political and popular action must be guaranteed against individual deviation assuring democracy on the highest level and guaranteeing its continuous and renewed life.

Popular organizations, particularly cooperatives, trade unions and youth and feminist organizations, can play an influential and effective role in entrenching sound democracy. These organizations must be advance forces in the fields of democratic action. The growth of the cooperative and trade union movement provides an endless store of enlightened leadership which can lay its fingers dierctly on the nerves of the masses and feel the strength of their pulse. The pressure which stifled the freedom of these organizations and paralysed their movement must be eliminated.

Public Freedom Guaranteed according to Law

Public freedoms are guaranteed within the limits of the law. The United Arab Republic guarantees for all citizens, without discrimination, freedom of opinion and expression, freedom of criticism and self-criticism, freedom of the press, freedom of formation of syndicates and cooperatives, freedom of education, freedom of belief, worship and practice of religious rites as well as other public freedoms.

Citizens have equal rights and duties before the law. There shall be no discrimination between them because of race, origin, language, religion or belief. Women must be equal to men in the exercise of public rights. The remnants of the shackles which obstructed the free movement of women must be dropped so that they may be able to share substantially and positively in the new life.

Universal Suffrage as Right of the Citizen

Suffrage is a right enjoyed by all citizens in the manner specified by law. Their participation in public life is a national

duty. The right of candidacy for public office and the right to vote are guaranteed to all citizens.

The principle of the sovereignty of the law is the ultimate guarantee of freedom. The right to litigate is guaranteed to citizens within the limits of the law. Judges are independent and are bound only by the dictates of their conscience and the law

SOCIAL AND ECONOMIC BASES

Socialism is the road to social freedom and it can be realised only by providing equal opportunities for every citizen to have a fair share of the national wealth. The base of the national wealth must, therefore, be broadened to meet the legitimate rights of the working masses of the people.

In the present world conditions the path of the revolution, which is the path of socialism, is an inevitability dictated by historical reality and by the broad aspirations of the masses in order to overcome social and economic underdevelopment in the Arab Nation.

Capitalist experiments in progress have proceeded hand in hand with imperialism, and the countries of the capitalist world have been able to reach the stage of economic set-off by exploiting the wealth of colonised peoples. But gone are the days of imperialist piracy in which the wealth of the peoples was plundered for the benefit of others without any legal or moral deterrent.

There have also been other experiments in progress which attained their aims at the cost of misery for millions of working peoples either for the benefit of capital or under the pressure of ideological doctrines which went to the extent of completely sacrificing living generations for the sake of unborn generations.

Progress by plunder or by slavery is no longer tolerable under the new human values. These values have been able to defeat imperialism and slavery. Apart from defeating both systems, these human values have also applied education for the attainment of progress.

In the countries which were forced to remain backward, capital is no longer capable of leading economic set-off at a time when major capitalistic monopolies have grown in advanced countries by depending on the exploitation of the resources of the people, and local capital is no longer capable of competition except behind high barriers of tariff or by tying itself to the world monopolistic movement, following its trail and becoming a tail to it and dragging its countries into this dangerous abyss.

Action to increase national wealth cannot be left to the improvisation of exploiting private capital and its mad whims which are motivated only by the selfish desire for profit. It is necessary, therefore, that economic set-off in the Arab Nation should be conditioned by three factors :

1. The pooling of national savings.
2. Using all the experiments of modern science for the investment of these savings.
3. Drawing up an overall plan for production.

The aim of planning in the socialist community is :

1. To achieve a balanced development of the economy in the various sectors.
2. To meet the public and private requirements of the community and the individual.
3. To effect a fair distribution of the national wealth.
4. To guarantee for workers a positive role in management, together with a real sharing in the profits of production, and minimum wages ensuring a decent life for the working man.

Economic Set-Off

It was necessary, therefore, that the people should control all means of production and direct the surplus in accordance with a specific plan. This is at the same time the path of democracy in all its political and social forms. But this does not necessitate the nationalisation of all means of production or the abolition of private ownership or violation of the legitimate

right of inheritance consequent thereupon. This aim can be achieved in two ways:

First: the creation of a capable public sector to lead progress in all fields and shoulder the main responsibility in the development plan.

Second: the presence of a private sector taking part in development within the framework of the overall plan without exploitation.

The people shall supervise the two sectors and have full control over both.

Efficient socialist planning is the only means of guaranteeing the utilisation of all national material resources and manpower in a practical, scientific and human manner to benefit the masses of the people and provide a prosperous life for them.

Such planning ensures proper utilisation of available, proven and potential resources. At the same time it guarantees a permanent distribution of basic services, improvement of existing ones and the extension of these services to areas which have been neglected as a result of long deprivation imposed by the selfishness of those classes which arrogantly dominated the struggling people.

The production set-up must realise that the aim of production is to widen the scope of services and that these services constitute the driving force behind the wheels of production. This set-up must rely on centralised planning and decentralised execution to make sure that all programmes are in the hands of the masses of the people and its individuals.

Private Ownership

Private ownership and private capital must be in a position which will not permit the emergence of feudalism or monopoly or exploitation. Private capital must also be subject to the direction of the popular authority, as is the case with the public sector. This authority shall promulgate legislative measures for it and shall direct it in the light of popular needs. It shall also destroy the activity of the private sector whenever it is based on exploitation or deviation.

The Liberation of Farmers from Exploitation

The Arab application of socialism in the field of agriculture is primarily designed to liberate the farmers from exploitation and domination by the following means:

1. Fixing a maximum limit for agricultural land ownership in order to eradicate feudalism and the exploitation of farmers and to prevent any resurgence thereof.
2. Increasing the productivity of the land by using scientific and technical methods.
3. Organising individual and collective investment in such a way as to ensure justice in the distribution of the yield of the land.

Belief in the Mission of Religion

As a conclusion to all this, the Arab people, living in an area which saw the birth of religions, believe in the message of religion and derive from the spiritual strength given by religions an incentive for popular struggle to attain their objectives.

It is our firm view that religion is one of the fundamental elements on which Arab society bases its life and future, side by side with all material elements which religion upholds. With faith in God and confidence in themselves, the people will be able to impose their will on life and shape it anew in conformity with their principles and aspirations.

THE STRUCTURE OF THE FEDERAL STATE AND ITS JURISDICTION

Agreement has been reached on the following principles:

1. To create a Federal State called the United Arab Republic on the basis of free Federation between Egypt, Syria and Iraq. The names of Federation members are to be the Egyptian Region, the Syrian Region and the Iraqi Region.

2. Every independent Arab republic believing in the principles of liberty, socialism and unity has the right to join

this Federation by free popular will with the approval of the constitutional authority of the Federal State.

3. Full international sovereignty belongs to the Federal State.

4. Citizens of the Federal State will have one nationality which is the Arab nationality enjoyed by all those enjoying the nationality of member regions and which will be regulated by federal law.

5. Sovereignty in the Federal State belongs to the people to be practised according to the Constitution.

Islam is the Religion of the State

6. Islam is the religion of the Federation and Arabic is its official language.

7. The flag of the Federation is the present flag of the United Arab Republic with three stars instead of two, and with the addition of a star representing each new nation joining the Federation.

8. The capital of the Federal State is Cairo.

9. The authority of the Federal State includes the following:

(a) *Foreign Policy:*

Foreign policy in all its aspects including foreign representation and treaties with other countries and international organizations, reserving certain cultural and trade affairs on a temporary basis to the authority of the Region.

(b) *Defence and National Security:*

Defence and national security being a part of the people and owing their loyalty to the people consequently take their orders from the federal state through the competent constitutional authorities.

Under defence and national security there fall the questions of war and peace, the land, naval and air forces and their equipment and the preparation of training and putting them to

use, also the defence councils, the general armed forces commands and military commands in the states ; during that transitional period these armed forces shall be left for a certain time under the jurisdiction of each Region and for a period to be agreed upon ; also the question of military industry, national security organizations, and the state of emergencies, martial law and special cases in which local authorities of the Regions are given the right to use the Armed Forces by delegation of the federal authority.

(c) *Finance and the Treasury :*

The Federal State deals also with federal taxes, the federal budget, the emission of treasury bills and federal bonds to finance the projects of the Federal State ; it also deals with foreign and domestic loans, with tariff laws and a policy aiming at establishing a tariff unity and a common Arab market as a necessary step to a unified Common Arab Market.

(d) *Economy, Economic Planning and Development :*

The federal authority covers also economic planning in industry, agriculture, trade and communications, coordinating the economic plans of the regions, and drawing up economic policy, also organising relations with international economic organisations, exchange matters, and the organisation of the exploitation of sources of natural wealth.

(e) *Information, Culture and Education :*

These fall also within the jurisdication of the Federal State including the establishment of a central federal agency for the planning of information affairs in the regions of the Federation. Execution of information policy may be either federal or regional. It also includes the creation of Supreme Councils charged with the planning and drawing up of the general policy of education, scientific research, culture and arts, within the framework of the Federation, implying unity of thought and unionist Arab national tendencies, with particular stress on the spiritual, scientific and moral preparation of the rising generation.

(f) *Justice and Coordination of Laws :*

Besides the organization of federal justice the Federal State should establish the principles of justice to be adopted by different regions and the separate legislation, civil, commercial and penal as well as procedural labour and social security legislation. These principles should finally lead after various stages, to a unified legislation in the regions of the Federal State.

(g) *Federal Communications :*

This includes organising communications, such as land, air, radio, telephone communications and observatories, on a federal level.

(h) *Other Affairs :*

This includes projects to be implemented jointly by the regions and the exceptional authorities during war or emergency and the formation of joint councils entrusted with various responsibilities within the framework of federal legislation. The Regions will be entrusted with the execution of federal laws and decisions in so far as such affairs are concerned.

(i) The Regions will be entrusted with all authority not included in the jurisdiction of the Federal State. Through a federal law, the regions may be authorised to exercise some of the jurisdiction as well as the execution of the laws of the federal authority for a particular period of time. In such a case, the federal authorities shall have the right to supervise the work of the regional authorities.

CONSTITUTIONAL ORGANS OF THE FEDERAL STATE

It has also been agreed that the organs of the Federal State and relations between them will be as follows and in accordance with Annex B, attached hereto :

First : **The National Assembly**

1. is the highest state authority in the U.A.R.
2. is the body which exercises legislative authority

3. is formed of two Chambers : *a*) A Chamber of Deputies composed of a number of members in accordance with the population in each Region to be elected through free and direct elections and by general secret ballot. The term of its membership is four years. *b*) A Federal Council composed of an equal number of members from each Region elected according to the provisions of the federal constitution. The term of its membership is four years and its members shall number at least one-fourth and at most one-third the number of the chamber of the National Assembly.

4. The National Assembly elects the President of the Republic and the Vice-Presidents in accordance with the provisions of the Constitution.

5. Each of the two Chambers shall examine political affairs concerning fundamental problems concerning the State policy in domestic and foreign affairs and take due decisions concerning them.

6. The President and all members of the two Chambers have the right to propose laws. The Constitution will establish the procedure and the special majorities required for their enactment.

7. No law can be promulgated unless ratified by both Chambers. In case of conflicting views of the two Chambers concerning a law, it will be submitted to a Conciliation Committee formed of an equal number of both Chambers.

8. The President of the Republic promulgates the laws after their ratification by both Chambers. He has the right to return a law during a period specified by the Constitution to both Chambers, and if both approve it by a three-fourth majority it shall became a law and shall be promulgated.

9. Each member of either Chambers has the right to submit questions to the Prime Minister and to the Ministers as well as to make interpellations. The Constitution and federal law will organize the method.

10. The Council of Ministers is responsible before the National Assembly and confidence shall be given and withdrawn through an absolute majority of both Chambers.

11. The President shall have the right of dissolution of either or both Chambers.

12. The National Assembly shall consider applications by new States to join the Federation. Approval shall be by a three-fourths majority of each Chamber separately.

13. The Federal Constitution may be amended by a three-fourths majority of each Chamber.

14. State constitutions may not conflict with the Federal Constitution and must be agreed upon before submitting the Federal Constitution to plebiscite.

15. Amendment of the State Constitution shall be made by the legislature of the State concerned in accordance with the method stipulated by the Constitution. Such amendments shall not be operative unless ratified by a three-fourths majority in each federal Chamber separately.

Second : **President of the Republic**

1. The Head of State is the President of the Republic who shall be elected by the National Assembly. He is invested with the authority of the State.

2. Any citizen eligible for membership in the National Assembly is eligible for election as President of the Republic. A candidate is declared elected if he obtains a two-thirds majority of the entire National Assembly. If the required number of votes is not achieved another vote shall be taken and the candidate who shall obtain an absolute majority of the total number of members of the National Assembly shall be elected. The Constitution regulates the remaining rules concerning election.

3. The term of the Presidency is four years. If the term expires while the National Assembly is being re-elected, the President continues in office until re-election of the Assembly is completed and a new President is elected.

4. The President is the Supreme Commander of the Armed Forces and president over the Council of National Defence.

5. The Constitution shall define the prerogatives of the President of the Republic. In particular, the President of the Republic shall :

(*a*) Represent the State;
(*b*) Promulgate the laws;
(*c*) Propose laws;
(*d*) Exercise the power of veto;
(*e*) Appoint the Prime Minister and Ministers, who must enjoy the confidence of the National Assembly and accept their resignation;
(*f*) Appoint and dismiss officers and promote commanders of the Armed Forces;
(*g*) Appoint judges of the Federal Supreme Court;
(*h*) Appoint the high officials of the Federal State in the cases defined by law.

Vice-Presidents

1. Three Vice-Presidents shall be elected, one for each Region, in the same manner and at the same time as the President.

2. The Vice-Presidents shall assist the President in his functions. The President shall have the right to delegate his authority to the Vice-Presidents, to invest them with some of his functions and to seek their advice on matters entrusted to him.

3. The Constitution shall regulate the remaining provisions concerning the Vice-Presidents.

Cabinet

1. The Council of Ministers shall be formed of the Prime Minister and Ministers.

2. The Council of Ministers and the Ministers shall be responsible for their actions to the National Assembly.

3. The Prime Minister and the Ministers shall continue to occupy their posts as long as they enjoy the confidence of the President.

4. The Federal Council of Ministers shall undertake the organisation and functioning of the Federal State and take the necessary decisions for this purpose according to the Constitution and the federal laws.

5. The Council of Ministers after its appointment shall present its programme to the National Assembly for approval.

6. The Constitution and the federal laws shall establish the rules applicable to the Council of Ministers and to the Ministries and the various other government organizations.

7. The Constitution and the federal laws shall organise the rules for Ministers.

Third : **The Judiciary :**

1. The union shall have a supreme court called the Supreme Federal Court, to be established by federal law under the provisions of the Constitution.

2. The National Assembly chooses the members of the Supreme Federal Court in accordance with the proposal of the President of the Republic, from among the judiciary and jurists.

3. The Constitution and the federal laws organise the jurisdiction of the Supreme Federal Court, provide immunity for the members of the Court, decide their term of office and the conditions of their relief.

AGREEMENT ON THE ORGANIZATIONS IN THE REGIONS

First : **President of the Region :**

1. Is elected by the Legislative Council of the Region for a term of four years and agreed upon by the President of the Republic.

2. Assumes the jurisdiction determined by the Federal Constitution and the Constitutions of the Regions.

3. Appoints the Cabinet of the Region and accepts its resignation.

Second : **The Regional Legislative Council :**

1. Each Region shall have a Legislative Council, elected by free, direct ballot.

2. The Constitution shall specify the functions of the Legislative Council.

3. The Legislative Council shall promulgate legislation applying to its respective region.

4. The regional Constitution shall be amended in the manner established by the Constitution. These amendments shall not be operative except after ratification by the respective majority in each of the Chamber of Deputies and Federal Council.

5. Questioning of the Cabinet and Ministers and of the Regional Ministers, and withdrawal of confidence from the Cabinet, shall be effected in the manner set out in the Constitution.

Third : **The Regional Cabinet :**

1. Each region shall have a Cabinet comprising a Prime Minister and Ministers.

2. The regional Cabinet shall be responsible to the respective regional Legislative Council, whose confidence it must hold.

3. The Constitution shall regulate cases of withdrawal of confidence from the Cabinet.

4. The Constitution and legislation shall specify the jurisdiction of the Ministries, the procedure of their operation and the provisions relative to the Ministers.

Fourth : **Courts of Law in the Region :**

The Constitution and legislation of the region shall regulate courts of law in the region and guarantee their independence and immunity.

TRANSITIONAL PERIOD

The following provisions were agreed to be adopted during the transitional period :

First : **In the Federal State**

1. The Federation's Constitution and President shall be subject to a referendum within a period of 5 months (from the date of publication of this Agreement).

2. The Arab Federal Republic shall be considered as existing on the date of the announcement of the results of the referendum.

3. The federal constitutional organs shall complete all their organs as stipulated by the Constitution within 20 months from the announcement of the referendum, after which the transitional period will end.

4. Each Region shall have the right to choose its own constitutional organizations as a preliminary step to the full establishment of the federal organizations, during the transitional period. The constitutional validity of the organizations of the Regions which may be established within this period shall be approved by federal legislations.

5. Agreement among the member Regions shall be reached for a programme to complete the unification of federal, military, foreign, legislative, economic and cultural organizations, etc., etc., thus facilitating the enactment of special provisions in the Constitution covering the validity of these organs.

6. All legislative and executive powers in the Federal State during the transitional period are assumed by a Presidential Council, presided over by the President; Vice-Presidents shall act as members of this Council.

The Formation of the Presidential Council

The Presidential Council will be formed of an equal number of members from each region.

7. The members of the Presidential Council will be selected by the legislative council in the Member States at the time of the proclamation of the Federal State.

8. The President of the Republic will have the right to appoint and dismiss Ministers.

9. The decisions of the Presidential Council shall be taken by the majority of votes.

10. The President of the Republic has the right to veto any decision or law taken by the Presidential Council.

11. The Presidential Council will be responsible for the following :

(*a*) Appointing the Vice-Presidents (a Vice-President for each Region) through an agreement with the legislative authority concerned in the Region during the transitional period.

(*b*) Appointing a President for each Region, with the agreement of the legislative authority in the Region during the transitional period.

(*c*) Appointing members of the National Defence Council and supervising the progress of its work.

(*d*) Planning the State's general policy and entrusting its execution to the Ministers.

(*e*) Coordinating public services between the Regions.

(*f*) Appointing members of the higher councils above referred to.

The Federal Cabinet

12. The Federal Cabinet consists of:

(*a*) The Prime Minister.

(*b*) The Ministry of Foreign Affairs.

(*c*) The Ministry of Defence.

(*d*) The Ministry of Information, National Guidance and Culture.

(*e*) The Ministry of Education, Higher Education and Scientific Research.

(*f*) The Ministry of Treasury and Finance.

(*g*) The Ministry of Economy and Economic Planning as well as Communications.

(*h*) The Ministry of Justice.

(*i*) The Ministers of State.

13. Further ministries may be established in accordance with a federal law.

14. Joint meetings of the Federal Cabinet and the Presidential Council can be held.

The following general rules were agreed to :

1. All legislation in force in any Region will continue to be in force until it is amended or abolished by the competent constitutional authority.

2. The agreements and treaties, which have been previously concluded by the government of any Region, will continue to be implemented within the region which has concluded them.

3. All the present government organizations and departments will continue to perform their duties in accordance wtih the various laws and regulations now prevailing until new rules and regulations are drawn up or until the old laws are amended.

4. Until a plebiscite has been held on the Federal Constitution, the Member States will form the following committees or authorities, the formation of which will pave the way for the federal establishments and organizations :

(*a*) A Unified Military Command.

(*b*) A Foreign Affairs Committee.

(*c*) A Committee for Economic Coordination and an Arab Common Market.

(*d*) Any other committees.

An appendix dealing with various constitutional organizations has been attached to this declaration. This appendix relating to the constitutional authorities and to the federal organs and their respective relation among the Regions, shall be considered as an indivisible part of this Declaration.

Cairo, 17 April, 1963.

APPENDIX A

THE FORMATION OF THE FEDERAL STATE AND ITS ORGANS

First : **The National Assembly**

1. is the highest organization of the authority of the State in the United Arab Republic ;

2. is the organization which exercises the legislative authority ;

3. consists of two houses ;

A — The Chamber of Deputies : consists of a number of members in proportion to the population in each region. It is elected by direct free election and by general secret ballot. The term of membership is four years.

B — The Federal Council : consists of an equal number of members from each region, elected by direct free election and by general secret ballot. The term of membership is four years. The number of its members is a minimum of one-quarter of the number of the members of the Chamber of Deputies and a one-third maximum.

4. Membership of the Councils. The case of vacant seats and internal regulations of these Councils are laid down in the Federal Constitution and in the federal laws.

5. Joint membership in the Chamber of Deputies, the Federal Council and the Regional Legislative Councils is not allowed.

6. Members of councils are not to be questioned for their opinions and views they advance in the exercise of their parliamentary duties. The Constitution provides for the immunities of members of the councils.

7. The meetings of the Federal Councils take place in the capital of the Federal State. The place of meeting may be fixed in any other Region by a federal law. The councils may also be convened, in case of emergency, in any other region by virtue of a federal decree. Meetings of the councils held in other than the legal locality will not be valid and the decisions taken by them are null and void.

8. The sessions of the Houses are laid down by the Constitution and are summoned by the President of the Republic; otherwise they convene on the day fixed according to the Constitution.

9. Any Council may hold extraordinary session upon the request of the President of the Republic or one-quarter of the number of its members. The President of the Republic shall be informed of such extraordinary session.

10. The National Assembly convenes in the cases laid down by the Constitution.

11. The two Councils discuss the basic affairs pertaining to the State's internal and foreign policy and the development of plans, and adopt resolutions concerning them.

12. The President and each of the members of the two Councils have the right to propose laws and the Constitution determines the procedure and the relative special majorities required.

13. No law can be promulgated unless it is approved by the two Councils. Should the two Councils differ in opinion in respect of any law such a law shall be submitted to a Conciliation Committee comprising an equal number of members of the two Councils, on condition that the chosen number from the Chamber of Deputies should have the same proportional formation as the Council. Should the Committee reach an opinion opposing the law (or the law after being amended), it should be referred to the two Councils. If the Committee does not reach an opinion or if any of the two Councils does not agree, the law is postponed to the next session (or to the next meeting).

14. The President of the Republic shall issue laws after the approval of the two Councils. He shall have the right to return any law within a period to be specified in the Constitution. If such a law is approved by the two Councils by a three-quarters majority of their members, it will be promulgated.

15. No Council shall take any decision unless the majority of its members is present. In the cases which do not require a special majority, resolutions will be issued according to the absolute majority of the members present.

16. Every member of the two Councils has the right to table questions or interpellations to the Prime Minister and the Ministers. The Constitution and the federal law shall regulate the manner in which such questions and interpellations may be tabled.

17. The Council of Ministers shall be responsible before the National Assembly. A vote of confidence or non-confidence may be passed by an absolute majority.

18. The Constitution and the federal law regulate the joint exercise of membership of the two Councils and public office.

19. The dissolution of any or both Councils shall be by a decision of the President of the Republic.

20. The President of the Republic has the right of speech in the National Assembly or in the Chamber of Deputies or in the Federal Council, upon his request. He also has the right to convey to them any messages or reports.

21. The Prime Minister and the Ministers have the right of speech in any Council and participation in the discussion. The Constitution regulates the procedures.

22. Joint membership in the Cabinet and in any of the Councils is permitted.

23. The National Assembly elects the President of the Republic and the Vice-President in the manner defined by the Constitution.

24. The National Assembly shall have the right to accept a new member to the Federal State by a majority of three-quarters of the members of each of the two Councils.

25. The Federal Constitution may be amended by a majority of three-quarters of the votes of each Council.

26. The Constitutions of the regions must be compatible with the Federation Constitution. They should be agreed upon before the Federal Constitution has been subjected to a plebiscite.

27. The regional Constitution may be amended by the Legislative Council in the manner to be specified by the Constitution. These amendments are not considered effective unless

they are approved by the Federal Councils by a majority of three-quarters of the members of each council.

28. The two Councils shall approve the treaties in the manner to be specified by the Constitution and the law.

29. The National Assembly has the right to declare war according to the Constitution.

30. The Constitution regulates cases in which the President of the Republic is impeached of high treason or disloyalty upon a proposal submitted by a fixed proportion of the members of the National Assembly.

31. The Constitution and the federal laws regulate the trial of the Ministers.

32. In the period of recess of the Legislative Councils a presidential council for the National Assembly, elected from among its members, in the manner specified by the Constitution, shall issue laws provided that they are approved by the two Councils upon their convening.

Second : **The President of the Republic**

1. The Head of the State is the President of the Repubilc who shall be elected by the National Assembly. He is invested with the authority of the State.

2. Any citizen eligible for membership in the National Assembly is eligible for election as President of the Republic. A candidate is declared elected if he obtains a two-thirds majority of the entire National Assembly If the required number of votes is not achieved another vote shall be taken and the candidate who shall obtain an absolute majority of the total number of members of the National Assembly shall be elected. The Constitution regulates the remaining rules concerning election.

3. The term of the Presidency is four years. If the term expires while the National Assembly is being re-elected, the President continues in office until re-election of the Assembly is completed and a new President is elected.

4. The President is the Supreme Commander of the Armed Forces and president of the Council of National Defence.

5. The Constitution shall define the prerogatives of the President of the Republic. In particular, the President of the Republic is competent to deal with the following :

(*a*) To represent the State in foreign relations to detach and to approve the detachment of diplomatic representatives and to ratify international treaties.

(*b*) To receive and approche the credentials of diplomatic representatives.

(*c*) To convene and dismiss the sessions of the meeting of the Chamber of Deputies and the Federal Council.

(*d*) To appoint the Prime Minister and Ministers enjoying the confidence of the National Assembly.

(*e*) To accept the resignation of the Prime Minister and Ministers from their functions.

(*f*) To promulgate laws ratified by the two councils.

(*g*) To propose laws,

(*h*) To veto laws.

(*i*) To make declarations and transmit messages and reports to the National Assembly.

(*j*) To appoint officers and relieve them from their duties, and promote the Generals of the Armed Forces in conformity with the Constitution and federal laws.

(*k*) To attend and preside over meetings of the Cabinet, to require reports from it and from the individual members of the Cabinet ; and to discuss matters with the Cabinet and its members.

(*l*) To proclaim a state of emergency in conformity with the Constitution.

(*m*) To declare war in conformity with the Constitution.

(*n*) To appoint the senior officials of the Federal State in the cases specified by law.

(*o*) To lay down, in conjunction with the Cabinet, the general policy of federal affairs.

(*p*) To appoint the judges of the Supreme Federal Court in conformity with the Constiution and the federal laws.

(*q*) To grant amnesty.

6. The President of the Republic shall not occupy any post in the government of any region or be a member in any Legislative Council.

2. The case of a vacancy in the post of President of the Republic is regulated by the Constitution.

Vice-Presidents

1. Three Vice-Presidents are appointed, one for each Region, by the same procedure, and simultaneously with the election of the President of the Republic.

2. The Vice-Presidents shall assist the President in the exercise of his functions, and he may delegate them to act in his place, confer on them some of his prerogatives, and consult them in the matters entrusted to him.

3. The Constitution regulates all the other matters relative to the Vice-Presidents.

The Council of Ministers

1. The Council of Ministers consists of the Prime Minister and the Ministers. Deputy Prime-Ministers and Deputy Ministers may also be appointed.

2. The Council of Ministers and the Ministers are answerable for their duties before the National Assembly.

3. The Prime Minister and the Ministers shall occupy their posts as long as they enjoy the confidence of the President.

4. The Federal Council of Ministers is concerned with the organisation and implementation of the affairs of the Federal State, and issues the decisions to this purpose in conformity with the Constitution and the federal laws.

5. The Cabinet shall submit, after its formation, its programme to the National Assembly for approval.

6. The Constitution and the federal laws lay down the provisions relating to the Council of Ministers, the Ministers, and the various other governmental organizations.

7. The Constitution and the federal laws lay down the provisions relating to the Ministers.

Third : **The Judicial Authority :**

1. A Supreme Court of the Federation is created with the title of "The Supreme Federal Court" and is to be constituted in conformity with the provisions of the Constitution and in virtue of a federal law.

2. The Federal State may create other Federal Courts, to be constituted under federal law.

4. The members of the Supreme Federal Court shall be selected by the National Assembly on the proposal of the President of the Republic, and shall be chosen from among members of the judiciary and of jurists, in conformity with the Constitution and the federal laws.

5. The Constitution and the federal laws provide the immunities for the members of the Court, and determine the terms of their appointment, and the cases for relieving them from their functions.

REGIONAL AUTHORITIES

I. The Regional President

1. The regional President shall be elected by the Legislative Council of the Region, for a term of four years; the election shall be approved by the President of the Republic. The procedure for candidature and election are laid down by the Constitution.

2. The regional President exercises the attributes specified by the federal and the regional Constitutions.

3. The regional President appoints the Cabinet of the region and accepts its resignation.

II. The Legislative Council

1. Each Region shall have a Legislative Council, freely and directly elected by secret ballot.

2. The Constitution shall define the Legislative Council's jurisdiction.

3. A Region's Legislative Council shall issue the rules and laws relating to that Region.

4. A Region's Constitution shall be amended in the manner defined by the Constitution. Such amendments shall not come into force until after approval by a three-fourths majority of the Chamber of Deputies and the Federal Council.

5. The Legislative Council shall discuss matters with the Region's Cabinet and Ministers, shall interpellate and question the Ministers and shall have the right to withdraw confidence from the Government in the manner defined by the Constitution.

6. A Region's Legislative Council shall be dissolved as follows :

(*a*) In accordance with a decision issued by the Region's President.

(*b*) By a decision issued by the President of the Republic, in accordance with a decision taken by the Federal Council by a two-thirds majority.

III. Regional Cabinet

1. Each Region shall have a Cabinet formed of a Prime Minister and Ministers.

2. The Regional Cabinet shall be responsible to the Region's Legislative Council and must enjoy its confidence.

3. Cases of withdrawal of confidence from the Cabinet shall be regulated by the Constitution.

4. The Constitution and the laws shall define the jurisdiction of the Ministries, their administration and rules relating to them.

IV. Regional Judiciary

A Region's Constitution and its laws shall regulate the judiciary of the Region and safeguard its immunity and independence.

TRANSITIONAL LAWS

I. The Federal State

1. A plebiscite on the Federal Constitution and the President of the Republic shall be held within a period not exceeding five months from the publication of this announcement.

2. The Federal State, the United Arab Republic, shall be considered as existing on the date of the announcement of the results of the plebiscite.

3. Federal Constitutional Organizations shall have completed all their organs as indicated in the Constitution within a period of twenty months at the utmost, after the publication of the result of the plebiscite results. The transition period will thus have ended.

4. Each region shall establish before this date the constitutional organizations it needs, in preparation for the complete establishment of all the federal organizations during the transitional period.

The constitutionality of regional organizations established during this period shall be approved by federal legislation.

5. Legislative and executive authority in the Federal State shall be exercised during the transition period by a Presidential Council headed by the President of the Republic. The Vice-Presidents of the Republic shall be members of the Council.

6. The Presidential Council shall be formed of an equal number of members from each of the regions.

7. Presidential Council members shall be chosen by the Legislative Authorities in Member States since the establishment of the Federation.

8. The President of the Republic shall appoint the Prime Minister and Ministers, and shall relieve them of their functions.

9. The Council's decisions shall be by the majority of its members.

10. The President of the Republic has the right to object to any decision taken or law issued by the Presidential Council.

11. The Presidential Council undertakes the following:

(*a*) Appointment of Vice-Presidents of the Republic (a Vice-President from each region), in agreement with those in possession of the legislative authority in the region during the transition period.

(*b*) Appointment of a President for each region, in agreement with those in possession of legislative authority in the region during the transition period.

(*c*) Appointment of a National Defence Council and the following up of its actions.

(*d*) Laying down and planning the State's general policy and entrusting the Cabinet with its execution.

(*e*) Co-ordinating public services between the regions.

(*f*) Appointment of the Higher Councils mentioned in the general principles.

12. The Federal Cabinet:

(*a*) The Prime Minister.

(*b*) Foreign Affairs.

(*c*) Defence.

(*d*) Information, National Guidance and Culture.

(*e*) Education, Higher Education and Scientific Research.

(*f*) The Treasury and Finance.

(*g*) Economy and Economic Planning, plus Communication.

(*h*) Justice.

(*i*) State Ministers.

13. Other Ministries may be established by the promulgation of a federal law.

14. Joint meetings may be held of the Federal Cabinet and the Presidential Council.

GENERAL RULES

1. All laws and regulations followed in any Region shall continue to be in force in that Region until their amendment or complete abrogation by the constitutional authority concerned.

2. Agreements and treaties already concluded by the Government of any Region shall remain in force within the territory of that Region.

3. All existing organizations and government departments shall continue their work, in accordance with the existing laws and regulations until these shall have been amended or replaced by new laws and regulations.

4. Member States shall agree on a programme to complete the unification of federal military, foreign, legislative, economic or cultural organizations or others, in order that reference to such a programme may be made in one of the Constitution's transitional articles.

5. Until the plebiscite on the Federal Constitution is completed, Member States shall undertake the formation of the following committees and organizations, so that their formation and their starting operation will pave the way for the real establishment of federal organizations when unity is ensured :

(*a*) A unified Military Command.

(*b*) A Foreign Affairs Committee.

(*c*) An Economic Co-ordination and Common Arab Market Committee.

(*d*) Any other Committee or Committees.

APPENDIX B

STRUCTURE OF THE STATE AND CONSTITUTIONAL ORGANIZATIONS

STRUCTURE OF THE STATE

First : **General Principles :**

1. A Federal State called the UNITED ARAB REPUBLIC shall be established on the basis of free unity between Egypt, Iraq and Syria. The names of the members of the Federal State shall be the — EGYPTIAN REGION —, THE IRAQI REGION — and — THE SYRIAN REGION.

2. Every independent Arab Republic which believes in the principles of freedom, socialism and unity may join this State by the free will of its people, upon the approval of the constitutional authority concerned in the Federal State.

3. The Federal State alone shall have full international sovereignty.

4. The nationality of the Federal State shall be enjoyed by anyone who enjoys the nationality of any of the Member States on the proclamation of the Federal State, or the nationality of any State on its joining the federation. The rules concerning the acquirement of the nationality of the Federal State or its loss or anything that is connected with it, shall be established by a federal law.

5. The people shall enjoy sovereignty in accordance with the Constitution.

6. Islam shall be the official religion of the State and Arabic shall be its official language.

7. The Federal State's flag shall be that of the present United Arab Republic with three stars instead of two. A new star is to be added when a new State joins the Federation.

8. A federal law shall determine the emblem.

9. The national anthem shall be established by national law.

10. There shall be one nationality — Arab — which shall be governed by a federal law.

11. Cairo shall be the capital of the Federal State.

Second : **The Authority of the State :**

The jurisdiction of the Federal State shall include :

1. Foreign policy.
2. Defence.
3. National Security.
4. Finance and Treasury (Budget, Customs, etc.)
5. Economy, Economic Planning and Development.
6. Information and National Guidance (on federal level).
7. Cultural Planning.
8. Coordination of General Education Higher Education and Scientific Research.
9. Justice and Coordination of Laws.
10. Federal Communications.
11. Other Federal State Prerogatives may be added by the method stipulated in the Constitution.

1. *Foreign Policy :*

A) All aspects of foreign representation, taking into consideration the regional factor in certain aspects such as commerce and culture which shall be transformed gradually from regional to federal law.

B) The affairs of the United Nations and other world organizations.

C) Treaties with foreign countries. Regions are, however, authorized to conclude agreements with the approval of the Federal State.

D) Extradition of criminals and political asylum.

E) Issuance of Arab passports and visas.

F) Entrance of aliens into the territory of the Federal State, their residence and deportation according to federal laws.

G) Questions pertaining to nationality and all other foreign questions.

2. *Defence :*

It is an established principle that the Armed Forces are part of the people and owe allegiance only to the people and take orders only from the people through the constitutional authority concerned within the federal national limits.

A) War and peace.

B) The preparation of land, sea and air forces, their armament, training and use.

C) The military command : A unified military command with local decentralisation of the prerogatives of local commands directly attached to the General Command. The affairs of local commands shall be conducted by the authorities of the Regions during the transition period deemed suitable for each Region.

D) The Defence Council and the General Command of the Armed Forces as well as the Regional Military Commands.

E) General Mobilisation.

F) War Industries.

3. *National Security :*

A) National Security Establishments agreed upon in the Constitution or by federal laws.

B) Proclamation of martial law when the Federal State or any of the regions is exposed to danger.

C) The State of emergency as specified by federal law, and may delegate to regional authorities the right to use the Armed Forces until the state of emergency ends.

4. *Finance and Treasury :*

A) Federal taxes.

B) Federal budget (from federal taxes or contributions from the Regions in the manner and for the aims agreed upon, or from loans or from other sources).

D) Internal or external borrowing are only to be permitted with the approval of the Federal State.

E) Custom laws and policy which shall gradually develop into the realisation of a united tariff system.

5. *Economy, Economic Planning and Development:*

A) A Higher Council for Planning.

B) Economic planning in industry, agriculture, trade and communications as well as the coordination of economic plans of the Regions.

C) A Higher Economic Council to examine joint economic questions and coordinate between them and to study these questions in relation to other countries.

D) Economic policy.

E) Trade representation abroad, its organization and trade treaties and pacts.

F) Organising trade between the Regions of the Federal State.

G) Organising payments among the regions of the Federation and with foreign countries.

H) Currency.

I) Federal banking affairs.

J) Relations with international economic establishments.

K) Federal Industries.

L) Joint Projects.

M) Nuclear energy and the natural resources required for its production.

6. *Information and National Guidance on the Federal Level:*

A) Establishment of a Central Federal Agency for federal planning of information.

B) Execution of the information policy shall be in part regional and in part federal.

7. *Cultural Planning:*

A) A Higher Council for Arts and Literature.

B) Arab Culture and its relation to other cultures.

8. *Planning of Education, Higher Education and Scientific Research:*

A) Higher Council or Councils for education and research.

B) General policy for education and research.

C) Curriculums.

D) Guarantees for unity of thought and unionist Arab national tendencies, and spiritual, scientific and moral preparation of rising generations which will build complete unity and establish a free socialist Arab society.

E) The conduct of Federal establishments concerned with educational and scientific affairs.

9. *Justice and Coordination of Laws:*

A) Unified principles for justice; the drawing up of the basic principles for laws such as the penal code, the civil law, the commercial law, the law of procedure, the labour law, the social insurances law, etc.

B) Coordination of laws with a view to unifying them in stages.

C) Federal Judiciary.

10. *Federal Communications:*

This includes all means of land, sea and air transport and federal communications such as railways, steamships, aircraft, post, telegraph, telephone, wireless and meteorology on federal level.

11. *Any Fresh Matters in Accordance with the Manner Specified in the Federal Constitution:*

A) All affairs and projects which jointly concern the three Regions.

B) Exceptional authority during war or emergencies in the Regions, in accordance with a federal law.

C) Making it incumbent on the Regions to execute the federal laws and decrees and to respect any particular obligation, and giving instructions to the regions to execute any decision taken by a federal authority.

D) Arbitration among region whenever differences arise.

E) Joint councils for various services in accordance with federal legislation.

F) The Federal State has the right to grant complete amnesty for crimes in accordance with federal law.

G) Special pardon is a prerogative of the President.

Third : **Authorities of the Regions :**

1. The Regions will be entrusted with all the authority included in the jurisdiction of the Federal State.

2. By federal law, the Regions may be authorised to exercise a part of the jurisdiction of the federal authorities for a specified period of time. In such a case, the federal authorities shall have the right to supervise the regional authorities.

3. The implementation of specified federal laws may also be entrusted to the regional authorities.

CONCLUSIONS

The experiments reviewed in the present report offer such wide differences of background and the duration of their activities has been so short that generalizations are difficult to venture. However, if we ask ourselves what is the score on Federalism as it has appeared in the Middle East the answer must certainly be—not a high one. (1) In none of the situations examined here has it proved a success in establishing a permanent form of government. What have been the reasons for this failure? Let us review the several situations:

LIBYA:

In Libya we have a federation which is the legacy of the War—a solution carefully planned after long deliberations and the best expert advice, carried out under the auspices of the United Nations. Every effort was made to reconcile the wishes and interests of three homogeneous areas. A constitution elaborated by the representatives of the people was accepted and put into effect with popular support. As it proceeded, however, the federal scheme developed serious weaknesses. The wide extent of the powers conferred on the local governments made it impossible for the central government to face the economic and social problems—external and internal—which called for unified action. The government processes became hopelessly deadlocked. During ten years of unceasing difficulties the tendency towards unitary government became constantly stronger. A solution was found in a resort to the constitutional powers of amendment. By successive stages changes were enacted which completely eliminated the federal principle. Through trial and error the new country developed a system more suitable to its problems.

From this record, however, it does not follow that federation has been altogether a failure in Libya. It seems more fitting

---

(1) The Federation of South Arabia is not included in this report.

to look upon it as a transitional but necessary stage in the country's development. Some form of union was obviously called for. Federation was the only measure open at the time for the reconciling of conflicting interests. While it did not offer an end in itself it at least served a useful purpose on the road to one.

ERITREA - ETHIOPIA :

Here we find a situation with a number of superficial resemblances to that of Libya, but with some fundamental differences. As before, federation was the result of the War. The problem of devising a form of government for a newly liberated country had been laid by the victorious powers on the lap of the United Nations. Basic principles of government were adopted by the General Assembly to be incorporated into the new Constitution. In imposing this rigid solution the United Nations declined to accept the solution proposed for a transitional and experimental period, during which the affairs of the territory would be conducted by the existing military administration with the collaboration of an Advisory Council appointed by the General Assembly, consisting Great Britain, Ethiopia and Egypt. It also failed to provide—as was fortunately not the case in Libya—for an orderly method of modification of the federal scheme. The Assembly of the Federation was formally forbidden from introducing into the Constitution "any provisions which would not be in conformity with the Federal Act", as approved by the General Assembly of the United Nations itself.

The anomalous character of the proposed federation of two States—one which was to be under the sovereignty of the other—is in itself sufficiently striking. At the same time practical difficulties of administration, similar to these which had arisen in Libya, made themselves felt. How much these difficulties were aggravated by the openly pronounced ambition of Ethiopia to absorb Eritrea is an open question. In the present case there were also radical differences in race, religion and language.

The failure of the federal principle in the present case may be attributed to a combination of causes. First, that it was inherently unsuitable as a system of government for an area of so

many diversified and conflicting interests. Second, that it was menaced by the greater power of one of its two Member-States, within whose sovereignty it was placed, and from which it failed to receive sympathetic support. Third, that it had been abandoned to its fate by the United Nations which had created it and had not only failed to provide it with any form of guarantee of existence but had denied it any measure of orderly constitutional development.

IRAQ - JORDAN :

The experience of this short-lived federation offers little in the form of useful lessons. The provisions of its constitution were drawn along conventional lines but were never put to the test. The political circumstances under which it was hastily formed, the essentially personal relations which dominated it and the great predominance in power of one of its two members gave to it a distinctly unreal and artificial character. Its early destruction by a violent political convulsion deprives it of all usefulness as a precedent for sister States in the Arab world.

UNITED ARAB STATES :

In this case the principle of federation was not involved. It was a confederation of independent States, one of them a socialist republic, the other a feudalist monarchy. From the beginning it was evident that the conditions of life and differences in views between the two partners were so great that they could not be bridged by mere allegations of devotion to a common cause, however noble. The conditions for any form of political union did not exist. The effort was doomed to an early failure and passed out of existence with practically no expression of political activity.

UNITED ARAB REPUBLIC :

In the case of the United Arab Republic we see a process directly the reverse of that which is to be seen in the case of Libya and Eritrea. In response, but with some hesitation, to a movement of great enthusiasm and under political stress, the more experienced of the two powers enters into complete

political union, conceived as a unitary State, with a non-contiguous power of common race and religion but with wide differences in economic and political background. The outcome proved that too much had been undertaken and too quickly. The parties accepted the inevitable and are engaged in an effort to harmonize their differences and advance their common aims in a more realistic and looser form of union.

In conclusion then the failure of the efforts here recorded can be attributed to a variety of causes, the foremost of which is the inherent difficulty of imposing throughout areas of widely differing social and economic backgrounds and of limited political experience, a complicated system of dual administration—and this quite apart from the ever present problems of satisfying the national prestige of the several States and the ambitions of their leaders. More and more the question will be asked as to whether the advantages normally supposed to be sought for in a federation,—military protection, economic support, and the more effective expression of social unity—cannot be more efficiently secured through less exacting forms of regional alliance and cooperation.

APPENDIX

EVOLUTION OF FEDERAL GOVERNMENT IN THE CONGO

Note

The introduction of the federal idea into the Congo may be said to date from the Round Table Conference of 1960, between representatives of the Congo and of the Belgian Government, at which a number of Resolutions were adopted on February 20, 1960, relating to the future government of the country, among them the fixing tentatively of the date of June 30, 1960, for the proclamation of independence.

The sixteen resolutions included the following points touching the structure of government (C.P.E. XIII, p. 480 et seq.) :— (1)

> The Congo is to be a State comprising six Provinces —corresponding to existing boundaries. The "Government" (in effect the Cabinet) will include at least one member from each Province. The Prime Minister and the Ministers —to be named by the King—are to be politically responsible before the two Chambers. ....
>
> A Fundamental Law will divide the powers of the Central Government and the Provinces in such manner as to attribute from and after June 30, 1960, and pending its definitive organization under the Constitution, an effective measure of autonomy to the Provinces.

The Round Table Conference was followed by the promulgation of the Fundamental Law of May 19, 1960 (C.P.E. XIII, pp. 595-625), which replaced the law of 1908,—the so-called

---

(1) The basic documehts on recent constiutional developments in the Congo will be found in the rich collection assembled in Volumes XIII and XV of the "Chronique de Politique Etrangère", published by the Institut Royal des Relations Internationales at Brussels, and which will be referred to as C.P.E. (Translations by the writer). These volumes are availdble at the Library of the Egyptian Society of International Law.

Colonial Charter,—under which legislative power had been exercised either by the King by decree or by the Belgian Legislative Chambers, and in case of emergency by the Governor General. The Fundamental Law was accompanied by a Law on Public Liberties (v. translation "Constitutions of the New African States", p. 46 et seq.) and by a general Treaty of Friendship (C.P.E. XIII, pp. 627-629) between the Congo and Belgium, providing for the elaboration of a Constitution by constitutional assembly, pending which the country would be governed by the system established by the law itself. The relations between the State and its component divisions known as Provinces, are defined in the following articles:

Title II. The Formation of the State.

Art. 6: The Congo, with its actual boundaries, is an indivisible and democratic State.

Art. 7: The State shall consist of six provinces, each one possessing a civil personality. Their limits are those which exist at the time of the entry into effect of the present law.

Art. 8: The State of Congo comprises central, provincial and local institutions.

The central institutions are :

a) The Chief of State.

b) The Government, directed by a Prime Minister.

c) The Chamber of Representatives.

d) The Senate.

The Chamber of Representatives and the Senate shall constitute the Parliament.

The provincial institutions are :

a) The Provincial Government under the direction of a President.

b) The Provincial Assembly.

Local institutions shall be organized according to the legislation existing at the moment of the entry into effect of the present law, subject to the application of Art. 160.

The State of Congo comprises in addition :

a) Economic and Social Councils.

b) A Constitutional Court.

Title III. Powers of Government.

Art. 14: The powers shall be exercised in a manner established by the present law.

Art. 15: Legislative power shall be exercised within the limits fixed by the present law, collectively by the Chief of State, the Chamber of Representatives and the Senate on one hand, and by each one of the Provincial Assemblies on the other.

Art. 16: The three branches of the central legislative power shall each possess the right of initiative of legislation.

In each province the right of initiative shall belong to the Assembly and to the Provincial Government.

Art. 17: Executive power, so far as governed by the present law, shall belong to the Chief of State with the counter-signature of the responsible Minister.

The provincial executive power is exercised in each province by the Provincial Government.

Art. 18: The judicial power is exercised by the Courts of Appeal and the Tribunals, Judgments and decrees are executed in the name of the Chief of State.

The draft of the Fundamental Law was accompanied by an elaborate Explanatory Note (Exposé des motifs) in which we find the following observations on the importance of maintaining an equilibrium between the central state and the provinces. (C.P.E. XIII, p. 552).

"In general outline the organization and functioning of the legislative power finds its inspiration in the principles which govern the organization and functioning of the Belgian parliament. It is important nevertheless to emphasize the fundamental difference between the bicameral regime adopted for the Congolese parliament and that of the Belgian Chambers. The proposed regime responds to the imperative necessities of a State in which it is important to establish an equilibrium between the power of the State and that of the provinces, between centralizing tendencies and tendencies towards autonomy, and to this effect to permit the intervention and participation of the provinces as such in the action of the central power. Thus, alongside of a Chamber of Representatives of the whole Nation, there will be established a Chamber which will group by equality of representation, the representatives of the six provinces of the Congo (Art. 87). In virtue of this principle neither Chamber will enjoy preeminence over the other and shall not hold a session alone."

It is unnecessary to review here the bitter struggle which followed the efforts of the province of Katanga to establish an independent State—an effort marked by the promulgation on August 4, 1960, of a separate constitution. (1) After long and arduous negotiation a plan for National Reconciliation was prepared by the United Nations and submitted to the central government at Leopoldville in August 1962. The opening paragraph of the plan under the title 'Constitutional Provisions' thus explains its general purpose. (C.P.E., Vol. XV, p. 948).

> "Between now and the month of September, the Central Government will present to Parliament, and until its adoption will support, a constitutional plan having in view the establishment of a federal government for the Congo. To this end the federal government has requested the United Nations to place at its disposition the services of international experts in matters of federal constitutional law. The central government calls attention to its communiqué of July 29, and invites all the governments of the States and all interested political groups in the Congo to make known their views on the various features which should be included in this constitution. In so far as these views shall be consistent with the federal character of the constitution they shall be taken into consideration as far as possible subject to the opinions of the States and the interested political groups which may be offered. The central government will give to the experts furnished by the United Nations, the necessary directives in view of the preparation between now and September of a final constitutional plan, such plan to call for the following distribution between the powers of the Central Government and the States."

Enumeration follows of a series of eight conventional national powers.

Under date of September 2, the Plan was accepted by Mr. Tshombe on behalf of Katanga. His letter of acceptance contained the following declarations: (C.P.E., Vol. XV, p. 955).

> Affirming the sacred right of the people of Katanga to autodeterminations, the Government of Katanga declares that it accepts with enthusiasm the decision to endow the

(1) For text of this Constitution, v. C.P.E., Vol. XIII, pp. 762 et. seq. For translation of various sections of same v. "Constitutions of the New African States", pp. 59 et. seq.

> Congo with a federal constitution ; eager to achieve this objective it accepts whole heartedly the Plan which outlines the general plan of a solution to be defined."

The work of constitution-making actively followed the cessation of hostilities. The draft of a Federal Constitution was prepared with expert advice by a Governmental Constitutional Commission (C.P.E., Vol. XV, pp. 964 et seq.), and this, in turn, formed the basis of a revised draft by another Group of Experts, whose work is now under study by Parliament.

The two drafts are closely similar. (1) Herewith is presented a résumé of the draft as submitted to the Parliament, accompanied by observations of the present writer, made elsewhere, on the institution of a Constitutional Court. Where the number of an article precedes a paragraph, the text has been given complete.

NOTE

Subsequent to the preparation of this résumé the following self-explanatory advice has been received by wire from Judge Badr (Leopoldville, April 20, 1964).

> Commissions draft provides federal structure with strong central and semi-presidential regime with chief-executive elected by special college unable to dissolve parliament but having initiative and veto and cabinet responsible only to him. Stop. Draft amendable by Government before referendum.

---

(1) The copy of the draft of which a résumé is here presented, has been kindly furnished, under date of Feb. 14, 1964, by His Honour Judge Moursi Badr, formerly a Judge of the Mixed Courts of Egypt and now serving as legal adviser to the Government of the Congo at Leopoldville. It is expected that substantial amendments will be made to this draft by the Constitutional Commission and the Parliament.

PROPOSED DRAFT CONSTITUTION
FOR THE FEDERAL REPUBLIC OF THE CONGO

RÉSUMÉ

The plan of government is a combination of the presidential and parliamentary systems. While the principle of ministerial responsability is accepted the President is endowed with very broad and active executive powers, far beyond those normally belonging to a titular head of State in a parliamentary system.

The proposed Constitution is a document of considerable length—190 articles—arranged in convenient logical form under six chapters as follows: General Principles, Distribution of Powers between the Federal and Provincial Governments; The Federal Organization; The Provincial Governments; The Constitutional Court; The Judicial Authority.

CHAPTER I. GENERAL PROVISIONS (Arts 1-28)

Chapter One comprises two sections, the first of which relates generally to matters of sovereignty and territory. The Congo is declared an independent and sovereign State under a republican and federal regime; the provinces of which it is comprised are to be as thereafter specified (their names are not indicated in the provisional draft.) Similarly, new provinces may only be admitted in accordance with provisions to be thereafter adopted. The fusion of two or more provinces requires the assent of the Provincial Assemblies interested. The capital is fixed at Leopoldville. The government of the federal district is a matter of exclusive federal authority. The Federal Republic of the Congo is declared to be a part of the African Unity to whose service it is committed. The integrity and unity of the Federal Republic of the Congo are inviolable. Sovereignty rests with the people. The motto of the Republic is Unity, Work and Justice. The design of the flag of the Republic remains to be prescribed. (The working language of the Parliament is French, Art. 108. It is also the language of the current constitutional texts.)

The second section is in effect a Bill of Rights under the title Fundamental Rights and Liberties Guaranteed by the Repu-

blic. Its twenty articles include substantially all the articles to be found in modern liberal constitutions and call for no particular comment. It includes social as well as political rights and also declares that there is no State religion nor may any religion be subsidised by the State. Political refugees may not be expelled. In general the rights of personal liberty are developed in elaborate detail.

CHAPTER II. DISTRIBUTION OF POWERS (Arts 29-38)

The second chapter defines the distribution of legislative power as between the federal government and the provinces; in principle the federal parliament legislates for all or a part of the federal territory; the provincial assembly for all or part of the provinces. There is reserved, however, to the feedral parliament, by a two-thirds vote of both of its chambers, the right to decide that a matter exclusively reserved to the federal power, shall be placed either within the exclusive power of the provincial government or within the concurrent authority of both. Such decision shall not enter into effect until it shall have been approved by a two-thirds vote of the provincial assemblies. The Federal Parliament may also authorize a Provincial Assembly to legislate on matters of exclusive federal activity and a provincial assembly may authorize the federal parliament to legislate on matters of provincial authority. Furthermore, on the proposal of the federal government, the federal parliament may decide, in the case of urgency or public necessity, and by a two-thirds vote of both chambers, that a matter exclusively attributed to the provincial power shall be temporarily placed within the jurisdiction of the federal government. As to matters within the concurrent jurisdiction of both powers, a federal law shall prevail in case of a conflict. As to matters exclusively provincial, the federal power may be substituted for the provincial power in three specific cases :— a neglect by the province to act in a matter within its jurisdiction; cases where such negligence is of a nature to compromise the national defence, territorial integrity, the protection of health, or morality, the authority and the partiality of the judicial power; and where a formal request has been addressed by the federal government to the province to take action within its jurisdiction and such order has been ignored for a period of one month.

Subject to these general principles the Constitution presents a list, under nine specific categories, of matters retained within exclusive federal jurisdiction. It defines within fifteen general categories matters committed to the exclusive federal jurisdiction. A following article contains a list, under eight different categories, of matters placed under the concurrent authority of the central and provincial government ; a final article provides that matters not previously mentioned will be within the exclusive jurisdiction of the provincial authority and notably the twenty-one topics thereafter specified, these latter relating, inter alia, to the political organization of the provinces within the general principles of the Constitution ; the provincial police ; the organization of provincial courts and the judicial police ; provincial elections and the provincial debt ; primary, secondary and normal education ; supervision of agriculture or forestry concessions ; the granting and supervision of mining concessions, subject to federal law ; prisons ; the development of power resources of provincial interest ; provincial and local railroads ; provincial taxes ; punishments applicable to the violation of provincial laws and elaboration of plans for economic and social development within the province.

CHAPTER III. FEDERAL INSTITUTIONS (Arts 39-123)

The third Chapter of the Constitution outlines the structure of the State in its federal aspects and declares that it is to be composed of the following federal institutions : 1) the President ; 2) The Federal Government under the direction of a Federal Prime Minister ; 3) The Federal Parliament ; 4) The Constitutional Court ; 5) The Economic and Social Council,—the headquarters of the first four being fixed at Leopoldville, the capital of the Republic.

The President

The President enjoys, concurrently with the Government, the right to initiate legislation (Art. 116), and may issue decree-laws between sessions of Parliament (Art. 118), subject to their ratification by Parliament at its next meeting (Art. 118). He may on the recommendation of the Government, in a case of emergency, proclaim a 'State of Emergency' ; and with the

approval of the Constitutional Court, may take all measures called for by the situation. During this period Parliament must remain in session (Art. 119).

The President also presides a bi-yearly Conference of Governors, to be convoked by him (Art. 120).

The President is designated as Chief of State and exercises the executive power in conformity with the Constitution, of which he is the guardian. He is elected for six years, with special provisions as to his holding over for a period of three months. Qualifications for the office of President are Congolese birth on the paternal side, the attainment of the age of forty years and the non-applicability of one or other of the cases of exclusion provided by a federal law. The President may be immediately re-elected only once. His election is by an electoral college composed of the two chambers and parliament and of four representatives especially selected for this purpose by each of the provincial assemblies. Election is by an absolute majority of votes. The presidential oath is included in the Constitution. In case of a vacancy in the presidency or an incapacity declared by the Constitutional Court, the functions of the Presidency are provisionally exercised by the President of the Senate. When a vacancy or an incapacity is pronounced definitive by the Constitutional Court, a new election must be held. The President is responsible for his actions taken in the exercise of his franchise only in the case of high treason.

The President appoints the Prime Minister (Art. 64)—the only conditions mentioned being that he select the person best qualified to establish a ministry of a character to secure the confidence of the Parliament. The other members of the Government (the Cabinet) are also named by him upon the recommendations of the Prime Minister.

With certain exceptions the actions of the President require the approval of the Prime Minister and the appropriate Minister, who, by such action, accepts responsability. The President accredits ambassadors to foreign powers and ambassadors from such powers are accredited to him. He ratifies treaties and other agreements in accordance with special provisions of the Constitution therein referred to (Art. 181-184). He convokes the electoral corps for the election of a new legislative chamber, as

provided by the Constitution, and may convoke both the Federal and Provincial Assemblies in extraordinary session. After consultation with the Prime Minister and the Presidents of the two Chambers, he may pronounce the dissolution of the Chambers in case of a prolonged ministerial crisis or when three ministerial crises have taken place within two months as a result of a vote of no confidence of the two chambers or when the two chambers shall so request or when one of the chambers may make the request with a majority of three-fifths of its members. The President delivers an annual message to the Parliament setting forth the policy of the federal government.

The President has an active role in legislative life. He promulgates federal laws under the conditions laid down in the Constitution and at any time before the expiration of a delay fixed for the promulgation of a law may call upon the Chambers for a new deliberation, giving a statement of his reasons for such a request, (Art. 52). He may be delegated by Parliament to exercise the legislative power and to issue decree laws as to specified matters (Art. 117).

The Federal Government

Passing from the section devoted to the President, to that of Government—the Constitution declares (Art. 63) "The Federal Government is composed of the Prime Minister and the Ministers. It may also include Secretaries of State attached to the Presidency or to the Ministries. The Federal Government shall, as far as possible, include persons coming from the different regions of the country."

As noted above the President appoints the Prime Minister. The other members of the Government are also named by him upon the recommendation of the Prime Minister.

The Federal Government "determines and conducts the policy" of the Republic (Art. 68). The Prime Minister directs its actions and is required to keep the President in touch with the conduct of its affairs (Art. 70).

The Federal Government is collectively responsible for the policy of the Cabinet and the Ministers are individually responsible for the actions of their departments and the Secretaries of State for the acts which they perform in the exercise of their

functions. Among other specified powers of the Government is that of the control of the Armed Forces of the country under conditions to be fixed by a federal law, (Art. 68) a power exercised in collaboration with the President as Supreme Commander of the Armed Forces with the power of appointing, in accordance with law, the Commander in Chief, and other high officers of the Army (Art. 57).

In case of any act in violation of the Constitution on the part of the Prime Minister or other high official seeking to replace the President or to disregard the powers of the Parliament or the Constitutional Court, the offending official is to be indicted before the Constitutional Court on application of the President or by a majority of the Chambers. Otherwise no member of the Federal Government may be made the subject of penal pursuit except by accusation before one or other of the Chambers, in which case he shall be brought before the Supreme Court of Justice (Art. 79).

Federal Parliament

The Federal Parliament is composed of two Chambers, the Chamber of Deputies and the Senate (Art. 84). Deputies are elected by secret direct and universal ballot on the basis of one deputy for 100,000 inhabitants, each fraction of the population equal to or above 50,000 giving right to an additional deputy. Each province, as also the federal district of Leopoldville are represented by an equal number of senators, the senators representing the province being elected by the provincial assemblies.

The number of members of the Senate is to be fixed by a federal law but may not exceed the number of deputies (Art. 85). Parliament is elected for a period of five years. Qualification for voters—which applies to women as well as men—is that they shall be Congolese of at least twenty-one years of age and not within one of the clauses of exclusion established by law. Deputies must have reached the age of twenty-five years; Senators the age of thirty-five, (Art. 87).

The electoral system is to be established by law.

The proposed Constitution contains a number of specific provisions in regard to covering the general field of parliamentary and legislative procedure. The initiative of legislation

belongs concurrently to the President and the Government, and may be had also on the request of one-tenth at least of the members of either of the Chambers. The Government alone, however, has the initiative of laws involving financial burdens for the nation or the opening of credits. Both projects and proposals (projets ou propositions) for legislation are first submitted to a Council of Legislation which is a commission composed of members of the two Chambers and each in turn transmits the projects to the Federal Government and the proposals to the headquarters Bureau of the Chambers; in each case accompanied by a report. All such projects or proposals for Federal law are to be first examined by the appropriate Commission and the Chamber to whom they are submitted and to whom a report is to be made by the Commission. Special provisions exist in the case of urgent measures.

A special provision is made for the delegation by the Chambers either at their own initiative or upon the request of the Government of legislative powers to the President as to certain fixed matters and duration. A further provision is made for the issuance of decree laws by the President with the approval of the Cabinet during the intervals of session of parliament.

A third special legislative measure authorises the establishment by the President acting on the recommendation of the Federal Government of a state of siege in case of imminent peril threatening the institutions of the Republic or the independence of the country, obstructing the normal functioning of federal powers. In such case the President is authorised to take the exceptional measures called for under the circumstances upon the advice of the Constitutional Court. The Constitution also contains provision for a conference of provincial governors; this twice a year upon call of the President; the purpose of such meetings being to strengthen the unity of the Republic and facilitate the coordination of the policy of the Provinces and the Federal Government.

CHAPTER IV. PROVINCIAL INSTITUTIONS

The institutions of Provincial Government (Chapter IV) are defined in similar manner but much more succinctly than the Federal Government, the principal organs being the Provincial

Government under the direction of the Governor and the Provincial Assemblies. In the case of the declaration of a state of urgency already referred to or by the request of the Provincial Assembly, the President names by decree a Committee under the presidency of a Federal High Commissioner who is temporarily charged with the administration of the province.

The Provincial Government comprises the Governor and members whose number is fixed by law. The Governor is elected by the Assembly. The members of the provincial government are named by the governor. The provincial assembly are elected by secret direct vote, electors having the same qualifications as in the case of the Federal Parliament and having had their habitual residence in the province for a period of two years. The provincial assembly is composed of one representative for each 40,000 inhabitants, each fraction of the population equal or above 20,000 giving right to an additional representative. The members of the provincial assembly may not be less than fifteen nor more than thirty. The provincial assembly meets twice a year. Its session may not exceed two months. Extraordiinary sessions are had at the call of the Government or upon the call of the provincial government or on that of the governor acting at the request of at least five members of the assembly. When the provincial assembly is called upon to give its approval to an act of authority, or whenever a request is made to the federal authority to establish a state of siege, the decision must be taken by an absolute majority of its members. In other cases the decision of the assembly is taken by a majority of the members present. French is the working language of the provincial assembly, subject to the right of the President to permit the use of other languages.

CHAPTER V. CONSTITUTIONAL COURT (1)

Article 141 : There is established in the Federal Republic a Constitutional Court charged with a watch over the observance of and respect for the provisions of the present Constitution.

---

(1) In connection with this proposal see Appendix for remarks of the present writer before the Seminar of the Egyptian Society of International Law, April 2, 1964.

A Federal Law establishes the organisation, jurisdiction, attributions and rules of functioning of the Constitutional Court.

Jurisdiction of the Court shall extend to all levels, federal and provincial.

Article 142 : The Constitutional Court has jurisdiction over (1) conflict between two or more provinces or between the provinces and the Federal Republic ; (2) questions relating to the interpretation of the present Constitution ; (3) all affairs as to which the provisions of the present Constitution give it competence ; (4) All matters, including those concerning administrative disputes (contentieux administratif). The decisions and the orders of the Constitutional Court are binding on all public authority (pouvoirs publics) and on all administrative and judicial authorities. They are not subject to appeal.

Article 143 : The decisions and decrees of the Constitutional Court shall be respected by all public organs and by all administrative and judicial authorities. They shall not be subject to appeal.

Article 144 : Resort may be had to the Court by the President of the Republic, the federal Prime Minister, the Presidents of federal chambers, the Governors of the Provinces and the Presidents of the Provincial Assemblies to the Courts. Administrative or Judicial Courts may not pronounce upon the constitutionally of laws ; when a question of this nature is raised before them they shall defer judgment, pending the decision of the Constitutional Court, unless that Court has already been called upon to pronounce upon the constitutionality of such law.

CHAPTER VI. THE JUDICIAL AUTHORITY

The chapter relating to general judicial organization is somewhat longer and comprises ten articles.

Article 145 : Judicial Power is exercised by judges who shall apply exclusively the law.

Article 146 : Executive power may not prevent, interfere with or suspend the action of the upper or lower courts.

However, the President of the Federal Republic may, for reasons of public safety and on the advice of the Procurator

General, suspend within a particular area of the Republic and for a fixed period, the repressive action of the upper and lower courts and substitute that of the military powers.

Wherever the authority of military jurisdiction is substituted for that of the courts of common law, the right of appeal may not be suppressed. In time of peace, except where a state of emergency has been proclaimed, the Military Courts shall exercise jurisdiction only as to offences committed by members of the Armed Forces.

Article 147 : No Court may be established except by virtue of law. No Commission nor Courts of Extraordinary Jurisdiction may be established under any denomination whatsover.

The Constitution gives the following classification of judicial tribunals :— The Supreme Court of Justice, the Court of Appeal, the Lower Courts, the District Courts, the Police Courts, and the Customary Jurisdiction, to which is added the provision that a federal law may establish administrative tribunals and may determine the composition and jurisdiction of courts with the exception of Police and Customary Courts whose jurisdiction and composition is fixed by the provincial legislation (Art. 148).

Article 149 : Courts of Appeal shall have jurisdiction, in the cases prescribed by the federal laws, over appeals against decisions of the lower courts, civil, penal or customary.

Article 150 : Judges of the Lower Courts, of the District Courts and Police Courts are named by the Governor of the Province. The conditions are fixed by law. The judges of the Customary Courts are named by the Provincial Governor in accordance with provincial legislation.

Article 151 : The jurisdiction of Lower Courts and District Courts is fixed by federal legislation ; that of Appeals Courts and Customary Courts by the provincial legislation.

Article 152 : The status of members of the Supreme Court, the Court of Appeals, of the Lower Courts and Police Courts covering particularly their salaries and their pensions, is established by federal law.

Article 153 : Judges of the Upper and Lower Courts may not be subject to criminal or civil proceedings by reason of

actions taken or statements made in the exercise of their functions.

Article 154: The sittings of the upper and lower courts shall be public unless the court shali declare that such publicity is contrary to the public interest.

All decisions of the courts shall be publicly pronounced and shall be accompanied by a reasoned opinion.

Article 155: All judicial decisions and orders are delivered and executed in the name of the President of the Republic.

CHAPTERS VII - X

ECONOMIC COUNCIL — PUBLIC FINANCE PUBLIC SERVICE — THE POLICE

A single article of the Constitution (Art. 156) establishes an Economic and Social Council whose composition and jurisdiction is to be fixed by law.

A special chapter (Chap. VIII) is devoted to Public Finance and includes the establishment of a Court of Accounts to be defined by law. A chapter on the Public Office (Fonction Publique, Chap. IX), provides that the status of office holders shall be established by federal law and creates a commission on public office (Commission de la Fonction Publique). Chapter X on the Police, provides that the Federal Government shall have a police force in the district of Leopoldville and may, in case of urgency or on the request of the Provincial Government send to any province a contingent of such force for the maintenance of public order. To this end the Federal Government may requisition the police forces of one province for the maintenance of peace in another. Each province has its own police force, the regulation of which shall be the subject of a Federal Police Code and a Legal Code.

CHAPTER XI. THE ARMED FORCES

This chapter provides that there shall be one National Army for Land, Sea and Air. A Council of National Defence is created under the direction of the Federal Minister of Defence with the duty of assisting the President of the Republic in the exercise of his duties as Supreme Commander in Chief of the Armed

Forces. Such Armed Forces may not intervene (Art. 180) in the general affairs of the province, except (1) upon the request of the Provincial Governor; (2) upon the proclamation of a state of siege, and (3) refusal of the provincial governor to respect a decision of the Constitutional Court.

CHAPTER XII.
TREATIES OF PEACE AND INTERNATIONAL AGREEMENTS

Article 181 : The President of the Republic negotiates and ratifies treaties. He is kept informed of all negotiations looking to the making of agreements not requiring ratification.

Article 182 : Treaties of peace, commercial treaties, treaties or agreements relating to international organization or involving State finance, treaties which alter legislative acts, which relate to the personal status, or which involve a cession, exchange or addition of territory, may not be ratified or approved except by federal law. They shall not take effect until after ratification or approval. No cession, exchange or addition of territory is valid without previous consent of the populations interested.

Article 183 : If the Constitutional Court, called upon for an opinion by the President of the Republic, by the Prime Minister or by the President of one or other of the Federal Chambers, declares that an international engagement contains a clause contrary to the Constitution,authorization for its ratification or approval may be had only after revision of the Constitution.

Article 184 : Treaties and agreements regularly ratified or approved constitute from the date of their publication an authority superior to that of provincial laws subject to reciprocity of application by the other party thereto.

CHAPTER XIII. CONSTITUTIONAL AMENDMENT

The right of initiative of a revision of the Constitution belongs concurrently to the Federal President and Government, to the Provincial Governments and to a minimum of one quarter of all the members composing one or other of the Chambers of the Federal Parliament. Such revision must be approved by each Chamber by a two-thirds majority of those present and voting, provided that such majority may not be less than an

absolute majority of all the members composing the Chamber. Where these conditions are fulfilled, the President of the Federal Republic will promulgate the new text, in conformity with Article 116, and the same shall enter immediately into effect. A special requirement, however, is made calling for an approval of at least two-thirds of the provincial assemblies in the case of constitutional modifications concerning the distribution of legislative authority, the admission or creation of new provinces, or of fundamental liberties, the election of the President, the representation of the Provinces in the Senate, the Constitutional Court, the independence of the judiciary or the revision of the Constitution.

CHAPTER XIV. TRANSITORY PROVISIONS

The final chapter of Transitory Provisions calls for the suspension of the sessions of the parliament based on the elections of 1960. The mandate of the present members of Parliament expires upon the reunion of the federal chamber elected in virtue of the proposed Constitution. Until such reunion, the existing Government is to have sole authority to convoke Parliament. The mandate of the members of the provincial assemblies shall expire at the time of the reunion of the assemblies elected in pursuance of the proposed Constitution.

The governmental institutions, federal and provincial, provided for under the proposed Constitution, shall be established within six months of its promulgation. The measures necessary for the establishment of such institutions and, until their establishment, required for the functioning of public services, shall be taken on the proposal of a Council of Ministers by an ordinance having the force of law. During the period or six months noted above, the Government is authorised to establish by ordinance the electoral regime for the assemblies called for by the Constitution. During this same period the Government may make such decisions as it shall judge necessary for the life of a nation, for the protection of its citizens and the safeguard of liberty.

ADDENDUM

On page 5, supra, reference is made to advices received by wire from Judge Badr, under date of April 20, 1964, as to the general features of the draft recently elaborated by the Constitutional Commission at Luluabourg and which supplants the previous draft prepared by a group of experts, a review of which was given on pages 6-18.

Since the preparation of this résumé Judge Badr has kindly supplied us with the text of the Luluabourg draft, as published, seriatim, in the columns of the local newspaper, the *Courrier d'Afrique*, of Leopoldville.

As the official French text of this draft is, however, not yet available, and in order not to delay the appearance of the present report, it will be sufficient to refer to the more notable alterations made by the Luluabourg draft.

As already indicated, the new draft in effect, substitutes a presidential for a parliamentary regime. While the method of the election of the President by an Electoral College, remains substantially the same, (his term to be five years instead of six), the provision of the earlier draft establishing governmental responsibility before the Parliament is replaced by formal declarations (Art. 73) that the members of the Governments are responsable only to the President and that the measure of control of Parliament over the central government is limited to "Oral or Written Question ; Interpellation ; Inquiries by Commissions ; Warnings and Remonstrance."

As to the distribution of powers between the Central Government and the Provinces, (as they are to be styled), the Luluabourg draft follows the system of its predecessor in the classification of *(1)* exclusive federal ; *(2)* concurrent powers ; and *(3)* powers reserved to the provinces, but with a distinctly increased emphasis on the exclusive federal powers—the number of which is increased from fifteen to thirty-four, with an added provision that as to matters of concurrent power, a federal law enjoys precedence.

The provisions (177-182) covering the organization and jurisdiction of the Constitutional Court are considerably expanded as compared with the four articles of the earlier draft. The basic difficulties referred to in the writer's note, infra, remain as a challenge to the experiment now proposed.

Regardless of further possible alterations, these gradual developments are interesting landmarks in the evolution of the federal idea in the Congo.

May 21, 1964.

NOTE ON THE CONSTITUTIONAL COURT

The following observations made by the writer at a seminar held by the Egyptian Society of International Law on April 2nd, 1964, on the topic, Law and the Federal State, are pertinent to the proposal for the establishment of a Constitutional Court.

> "In passing, it is of interest to note that in some States a system has been adopted—or planned—to commit to a special court alone the duty of passing on the constitutionality of laws. An example of this is seen in the proposed Constitution for the Congo, which establishes a special Constitutional Court, to which is committed the decision of all disputes between provinces or between a province and the republic ; of all questions relating to the interpretation of the Constitution ; and of matters as to which competence is given to the Court by the Constitution, relating to the administrative powers.
>
> This is an arguable solution. It may be asked, however, if it is not in the interest of a healthy constitutional life, to leave to the judges of the land—to **all** the judges—the duty of studying and applying wherever called for, the Supreme Law of the land and of thus making the Constitution a truly vital part of our whole governmental system, —and of bringing it home also to the life and understanding of the people. There is also the extreme difficulty, if not hopelessness, of interrupting every legal proceeding wherever a question relating to the interpretation of the Constitution arises, and of sending it off, unsolved to another judicial body and of awaiting its answer. Constitutional questions do not appear in neat little packets susceptible of being sent off to another tribunal for decision. It may be asked also whether such a proposal does not fail to take into consideration the infinite variety and complexity of federal questions which, for the most part, do not involve sharp questions of the constiutionality of the laws so much as it does those relating to the application and interpretation of constitutional provisions, as applied to special situations as they arise.

Printed by
COSTA TSOUMAS & Co.
5, Wakf El Kharbotly St. -- Tel. 900118
CAIRO -- U. A. R.

EGYPTIAN SOCIETY OF INTERNATIONAL LAW

LAW AND THE FEDERAL STATE

JASPER Y. BRINTON

Gentlemen,

It was my fortune to be born in the city of Philadelphia—the home of the Declaration of Independence, and to receive my first lessons in the law within the shadow of that stately building where the oldest of all Federal Constitutions was given to the world. Then, early in my legal career I had the privilege of serving for several years as a law officer for the Federal Government in my State of Pennsylvania. And more recently, at the other end of a long legal journey, I have had occasion to enquire a bit into the progress of Federations in other lands. This will explain why, today, I propose to take as the basis of our talk the workings of the American Federal State, not because it may be better than any other federal system (I have no doubt it has many defects) but because it is the one I know the best and which by reason of its long existence, offers perhaps the greatest wealth of illustration. The problems which have faced the Courts in America may be widely different from those which face the constitution makers in, for instance, the new African States—and the illustrations I offer may sometimes seem very far away—but at bottom the principles are the same and our American experience may possibly offer useful warnings.

NATURE OF A FEDERATION

To begin with let us understand what we mean by a federation. The word is loosely used, but without wasting our time on definitions I ask you to understand for the purpose of our talk—a system (quite different from a League or a Confederation), in which the powers of government—*all* the powers are divided between general and regional authorities— coordinate

---

(Note). For the convenience of any readers who may wish to consult the texts of the decisions mentioned in these remarks a list of references is appended. All of these reports are available at the Library of the Egyptian Society of International Law.

but independent, each of them imposing its authority directly upon the people. These powers are strictly defined by a written Constitution, a fundamental document which cannot be altered by ordinary legislative process; its amendment will require some more deliberate expression of the public will. As to the division of power the line will be drawn between matters of an essentially national character, such as foreign affairs, the currency, the army, the post, the national budget, calling for the exercise of a central authority, and, on the other hand, those which relate primarily to the every day affairs of a community. The essence of a federal system, however, is not so much the division of powers, which may be made according to the requirements of a particular situation; as it is their coordinate and simultaneous exercise.

In a federation then, we have, so to speak, two layers of authority, each independent—independent but interpenetrating —operating at the same time over every inch of the area—two separate orders of government to both of which all the inhabitants of the country are directly and personally subject. It is the interactions of these two orders in the field of Law which concern us today.

THE STATES

Now before I enter into the relationship of these two orders of government—let me say just a word about one of them—the *States*. To the outside observer—to the world abroad —the picture of America is so largely reflected in the activities of the national government that the position and the power of the federal state is not seen in its proper perspective. The traveler from abroad will pass from one coast to the other without feeling the impact of state law. He will be enjoying federal privileges—his entry into the country—his contact with the customs—his freedom to pass from one state to another—his use of the post—and of money—all these rights are expressions of a national power. But let me ask you for a moment, to look at another side of the picture and to by-pass the City of New York—really an American rather than a State institution (it is not the capital of a State)—and to move to the city of Harrisburg—the capital of the State of Pennsylvania with its eleven

million citizen (1)—the Keystone State—for each of our States has its popular name—the Empire State—the Lone Star State (of Texas), the Sunshine State—the Golden State—and so on, just as it has its flag and its officially adopted flower—New York with its rose; Pennsylvania its mountain laurel; and indeed its adopted bird—New York with its eastern bluebird; Pennsylvania its ruffed grouse. But beyond all their flags and birds and flowers—each State has its own Constitution—many of them more elaborate than the Constitution of the United States—and some of them among the oldest political documents in American history. But to return to our State Capitol. In the centre of this city of Harrisburg stands one of the most magnificent public buildings in the country. It is the seat of a highly organized Government, with a Governor and a legislature composed of a Senate and a Lower Chamber, whose duty it is to debate and proclaim the laws governing most of the daily affairs of the citizens of the State. The Governors of our States, I might add occupy posts second only in importance to that of the President of the nation and belong to that small body of men from which the Presidential candidates are almost always selected.

This building—our Capitol—is also the home of the Supreme Court of Pennsylvania—the head of a judicial hierarchy which includes, in addition to its Supreme Court—an intermediate Court of Appeals of high dignity, and a great body of local courts, distributed throughout the sixty-seven counties of the State—some of which, I may add, are very large, as for instance, the County of Philadelphia with its population of two million. (I have here an illustration of the early labours of these Courts in the form of a series of manuscript digests of the law, 750 pages each, prepared by a member of the Supreme Court in the early part of the last century and whose grand-father,

---

(1) In the United States the residents of a State are also citizens of the State. They enjoy a dual citizenship. The Constitution reads — Amdt. XIV — "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside." The purpose of this declaration was two-fold—an assertion of the supremacy of national citizenship and the granting of both types of citizenship to the negro.

bearing the same name, had been a member of the court before him. It is, I think, just such patient devotion to the science of the law as we see here, that stands at the basis of American constitutional liberties.)

Collaborating in the administration of justice, are the legal officers of the State—the Attorney General and his staff at the capitol, and, in every county—(there are seventy of them)—the District Attorneys for the prosecution of crime, and the Solicitors for the defense of the patrimony of the State. Need I say to you that a great and powerful political body such as this—and the same observation applies in principle throughout our country—is quick to assert and jealous to defend the powers which are granted to it under our Federal Constitution.

THE FEDERAL COURTS

Ceci dit—as the French say, let us turn to Washington and the exercise of *federal* judicial power. You are no doubt familiar with the system of federal courts—the Supreme Court, with its nine venerable justices,—which occupies such a conspicuous position in the American picture. Below this stands a series of lower federal courts. There are ten of these so-named Courts of Appeal, and below them in jurisdiction the Federal District Courts, a hundred and more in number. And then there is the Attorney General of the United States and the body of United States Attorneys—(one in every federal district)—with their legal staffs. This is the federal judicial picture. To these courts have been given jurisdiction in matters corresponding to the power of the federal government itself, as defined in the Constitution, and let me remind you that the Federal Government is one of strictly defined powers—and that—under the Constitution, the powers "not delegated to the United States nor prohibited by it to the States, are reserved to the States respectively or to the people." The jurisdiction of the federal courts thus extends, inter alia, to cases arising under the constitution and the federal laws and treaties; cases affecting ambassadors;—cases of admiralty controversies to which the state may be a party, and controversies not only between States, but to cases between citizens of different states—the latter proviso being designed as a protection against a possible bias on the part of

local courts. This is a clause, I might add, of diminishing importance in our country. Suitors from other states frequently find it more convenient to seek their remedies in the courts of a sister state.

THE DUAL JURISDICTION

Each of these two judicial systems is equipped with the necessary administrative power to carry its decisions into effect —the Federal Courts have their United States Marshalls—the State Courts their Sheriffs—and behind them both is the police power of the State and Federal governments.

The two systems work together without friction. Their fields of action are clearly defined and there is no occasion for conflict. Let me give you a practical illustration. My office as a Federal District Attorney was in the Federal Building—a very large granite structure extending the length of a city block —which was also the federal court house—the seat of an Upper and a Lower Federal Court. The ground floor was the city Post Office. Several blocks away was the Municipal Building of the City of Philadelphia—its City Hall—occupying a full city square —with its marble tower as high as our own tower here in Cairo and with perhaps a dozen court rooms for the local courts, and a chamber for the State Supreme Court—when sitting in that city. Here too were the offices of my 'opposite numbers'—the far larger staff of the District Attorney of the County of Philadelphia. Now, the first case I was ever called upon to try was that of the robbery of a country post-office within my federal district. If the robbers had chosen to rob the farm house across the road—the case would have gone to a county court and the federal courts would have had nothing to do with it—unless (forbid the thought) some violation of the rights of the accused had occurred in the county trial leading, eventually to a resort to the Supreme Court of the land.

Now if you should ask the question, why there should exist these two judicial systems, the answer would be first of all that at the time of the adoption of our Constitution the Courts of the several states had all of them been for many years in successful operation some of them a century or more. There was never any question of their abolition. To this, one might

add that the provisions of any constitution—or any law—can only be assured of respect if there are available courts of law to carry them into effect—and that the courts of the separate states—their own creation—are not the appropriate organs to deal with obligations arising under the exercise of federal power as created by the federal Constitution. If the supremacy of the national constitution is to be maintained it must be placed under the guardianship of a national judiciary. On the other hand, if the States were to be deprived of the right to execute their own laws in matters reserved to them by the Constitution—and were to be thus under the control of the federal judicial system, the whole idea of a federation, of a dual authority, would be negatived. However, as to how far, in a newly created federation the judicial system can be to some degree unified is an interesting question.

CONSTITUTIONAL REVIEW

Now on the threshold of our judicial edifice stands a principle which applies as well to a unitary as to a federal state—that of constitutional control of legislation. If a conflict arises between the provisions of a written constitution and an act of the legislature—who is to decide as to which is to prevail? The answer to this question was given early in our history—to be exact—160 years ago—and was recorded in an opinion of the Supreme Court of the United States under the presidency of one of the greatest of our jurists—John Marshall. It is not written in the text of the Constitution but was considered to be a logical and unescapable conclusion. The question arose in a suit brought to compel the Secretary of State—James Madison, who later became President—to deliver to certain officials—justices of the peace, the 'commissions' of appointment to which they were entitled. The decision turned on the constitutionality of the law under which they had been appointed. The court found that the law was in violation of the Constitution and could not be given effect. Since the case is such a landmark in our constitutional system—and is so often quoted in other countries—let me read you a few short passages from the opinion. (Incidentally the opinion is not a long one. Very often the most important opinions are short. The opinion of Chief

Justice Warren in the Segregation Case, of which I shall speak later, is a good example.)

> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or comformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution and the Constitution is superior to any ordinary Act of Legislature, the Constitution, and not such ordinary Act, must govern the case to which they both apply."

This solution, it will be noted, makes every court in the land—whether it be federal or state—and as far as its jurisdiction goes,—a constitutional court—and this for the simple reason that it is a *court of law*—and the constitution is the living—the Supreme Law.

In passing, it is of interest to note that in some States a system has been adopted—or planned—to commit to a special court alone the duty of passing on the constitutionality of laws. An example of this is seen in the proposed Constitution for the Congo, which establishes a special Constiutional Court, to which is committed the decision of all disputes between a province or between a province and the republic; of all questions relating to the interpretation of the Constitution; and of matters as to which competence is given to the Court by the Constitution, relating to the administrative powers.

This is an arguable solution. It may be asked, however, if it is not in the interest of a healthy constitutional life, to leave to the judges of the land—to *all* the judges—the duty of studying and applying wherever called for, the Supreme Law of the land and of thus making the Constitution a living and vital part of our whole governmental system,—and of bringing it home also to the life and understanding of the people. There is also the extreme difficulty, if not hopelessness, of interrupting a legal

proceeding wherever a question relating to the interpretation of the Constitution should arise, and of sending it off, unsolved to another judicial body and of awaiting its answer. Constitutional questions do not appear in neat little packets susceptible of being sent off to another tribunal for decision. It may be asked also whether such a proposal does not fail to take into consideration the infinite variety and complexity of federal questions which, for the most part, do not involve sharp questions of the constitutionality of the laws so much as they do those relating to the application and interpretation of constitutional provisions as applied to special situations as they arise.

INTERSTATE COMMERCE:

With those preliminary observations allow me to offer you a few practical and as far as possible recent illustrations of contact between the Federal and State powers in the field of law in the United States.

One of the most fundamental rights in a Federal State is that which guarantees the free movement of people and their property from one state to another. It is impossible to conceive of a federation in water-tight compartments where movements of the people from one state would be subject to the whims and special interests of those of another. In the case of the American Federation this right is confirmed in one of its most important provisions under which the power "to regulate commerce with foreign nations and among the several states and with the Indian tribes" is given to the Federal Congress and consequently is denied to the several states. The purposes of this grant of power as, expressed in a dozen words, was to empower the Federal authorities to prevent the states from interfering in any way with the freedom of commercial intercourse between them.

A very broad meaning has been given to this power. It includes almost every possible phase of the actual transport of goods and communications; the relation of carriers and their employees; the right to regulate rates;—to construct and operate national highways; to exclude commodities from transportation (this would include, for example, dangerous and obscene matter), and going a step farther in the same direction,

and to take a rather special case, the right even to exclude individuals who are engaged in an unlawful occupation, as for instance the transportation, in interstate commerce of women for immoral purposes. This is the famous White Slave Act or Mann Act. Obviously such broad powers as these, touching as it were, the very heart-beat of the nation, have involved hundreds, nay thousands of decisions—all of them expressions of the federal power in action, in relation to the states. Let me call your attention to two illustrations of the exercise of this power in regions of special public interest. Let me take first the American experiment in the field of prohibition.

Under the clause I have quoted, the right of manufacturers of alcoholic liquor to send their products into neighbouring states and to sell it there, was protected as long as the products remained in their original packages. As the Supreme Court observed... "Sale is the object of importation and is an essential ingredient of that intercourse of which importation constitutes a part. Congress has a right not only to authorize importation but to authorize the importer to sell." It was only after they had become incorporated into the body of the merchandise of the particular State that its jurisdiction over them could be asserted. Now, many of our States had adopted, as they have the right to do, the principle of prohibition of alcoholic liquors, but the effectiveness of their laws was destroyed by the right of other states to send in their goods and to sell them in their original packages. Efforts to enforce prohibition in the several states were fatally obstructed. The movement in favour of general prohibition, however, grew so strong, that in 1919 the United States sought to remove this obstacle by a drastic measure. It adopted an amendment to our Constitution abolishing the sale of liquor throughout the entire country. This was followed by a Federal Act, the Volsted Act—designed to carry it into effect. Now, the plan, as you may recall, did not work. After some years of painful experience the amendment was repealed in 1933 and it was left to each state to decide for itself, —but with the provision this time that thereafter the people of one state could not, under the protection of the rights of freedom of commerce, invalidate the laws of another state by sending intoxicating liquor into a State where it was prohibited. Such

is the rule today. It is an illustration of how in a federal state, under constitutional rule, the public opinion of the country can proceed by a process of trial and error, and when necessary by constitutional amendment, to carry into effect the will of the majority of the population.

Now let me give you an illustration of the limitations in the use of this power—a limitation which did not call for a constiutional amendment. It occurs in the field of labor. A state is quite free to fix the hours of labour of its men—and women and children—almost entirely free—for it must not adopt standards which are unreasonably oppressive of personal liberty. However, there is one area in which public opinion of the country at large has sought to express itself by a uniform regulation—that is the question of child labor. And may I here interject a personal experience which illustrates very well the respective roles of the States and the Federal Government. For many years I was President of an organization known as the Pennsylvania Child Labor Association devoted principally to securing better working hours for children. Pennsylvania was a great manufacturing State and the effort to enforce a different system of working hours as between children and adults faced strong opposition. Failing to secure the passage of a State law, we sought the help of the Federal Congress. From the State Capitol at Harrisburg we went to Washington and secured the passage of a law prohibiting inter-state commerce in goods which had been the product of child labor. The Supreme Court, however, held that this was not a *bona fide* regulation of commerce but was an invasion of the rights of the states. Then we secured the passage of a federal law imposing a tax on the products of child-labor. This too was found to be unconstitutional. Finally an amendment to the Constitution itself was proposed—and is still, I believe before the States—but it will never be adopted, for the reason that in the meantime other solutions have been found—both within the States themselves in an improvement of their own laws and by the adoption in 1938 of a Federal law—the Fair Labor Standards Act which covers adequately the whole field of labor and has been held to be constitutional.

CIVIL RIGHTS :

One of the first concerns of any Government must be to provide for its citizens an effective guarantee of the protection of those sacred rights of personal freedom which are solemnly declared in any constitution. Without such a guarantee they are empty words.

In a federal state the protection of these rights is a dual responsability, with the primary—and wider responsability falling on the States, through their closer relation to the daily affairs of their citizens and their administration of the greater part of the criminal law of the land. The federal government, however, has its responsibilities both as to the purely federal matters falling directly under its administration—and also as an ultimate appeal in cases of alleged violations of civil rights by the States. Of recent years the federal government has been assuming a steadily enlarging role in this field—as exhibited, in a practical way in the vigorous debate which has been going on for some months over a new Civil Rights Bill—a law designed to reinforce the power of the federal courts in this field as far as such federal power can be constitutionally extended—for as already observed, the federal government is not all-powerful. Let us, however, confine ourselves today to a few of the problems offered by the states in their legislation, and in their administration of the criminal law.

Needless to say the duty of the Courts in questions of this character is exceedingly delicate. Each State is entitled to make its own experiments in government. The States are laboratories —responding to the developing ideas and to the public opinion. This is good—in a democracy—provided the rights of the people under the constitutions are respected. Here stand the courts.

Now the Constitution declares that no State "shall deprise any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws". A similar prohibition exists in the case of the Federal Government itself in matters falling primarily within its jurisdiction. This means, among other things, that a trial must follow the fundamental principles of justice ; it must be impartial and public ; the accused may not be required to

testify against himself ; he must be allowed to have the service of counsel ; his confession must be freely made and not the result of coercion ; the trial must not be held in an atmosphere which precludes a fair hearing and so on. (Here we even have the question of possible prejudice through undue publicity by television and other means—before the trial). These are all very basic rights in a free country—but they are not always so easy to define and to protect in practice. They give rise to much litigation. And since as you have noted they are protected under the Federal Constitution (as well as by the constitutions of the several States) if these rights are denied by the States a final resort to the protection of the federal courts is, in principle, allowed.

Let me select one familiar illustration of this protection—the right to the equal protection of the laws—as applied in the case of integration in the public schools.

For a considerable period of time after our Civil War, it was the custom in a good many of our States to provide separate schools for coloured pupils—as also separate accommodation for travellers of the coloured race on trains—a system which, when it was attacked was sustained by the Supreme Court—provided that the opportunities and accommodations were equal —"separate but equal treatment"—was the phrase. But happily times changed. One after another, stey by step, the varied forms of discrimination against racial groups were struck down by the Courts, and in 1954, the Supreme Court rendered a decision over-ruling that of half a century before, in regard to schools—a decision which was soon followed by similar rulings in the case of public recreation facilities and so on.

Here is the language of the Court in the Segregation Case in the words of its Chief Justice. (As you will recall, our President had the pleasure of presenting to him, last summer, for the Library of the Supreme Court of the United States, a set of our Review).

> "We come then to the question presented. Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities ? We believe that it does."

The practical execution of this decision and of those which have followed it has given rise to much difficulty. For, let me remind you that legal decisions are always rendered in a particular case and not automatically carried into effect in all other similar cases; and also that these school cases involved what is an essentially state function—the administration by a State of its school system. Obedience to the new rule has therefore been primarily a matter for the states to carry out subject to final judicial scrutiny. The Supreme Court has therefore left to the States a wide margin for practical adjustment, as reflected in its decree:

> "We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties, the cases will be restored to the docket and the parties are requested to present further argument;—the Attorneys General of the **States** requiring or permitting segregation in public education will also be permitted to appear as amici curiae."

and so the long and patient effort began to give effect to the decision by taking into account the practical aspects of every particular situation. The Court has ordered that adjustment be made "with all deliberate speed." A rapidly diminishing number of Southern States have tried to devise every means within their power to avoid prompt obedience to the new principle,—as being contrary to the public opinion and traditions of their people. Here, then we have a clash between the federal and state laws; here we see a practical expression of the difficulties encountered in a federal state. Obviously there has been room enough for evasion and postponment and for the waving of the flag of states' rights, and even for such a show of resistance that federal troops have been called upon the scene. The process of adjustment is often long and contentious. It has been a painful and tragic chapter but it is being slowly brought to an end.

Let us take another category of civil rights. The Constitution of the United States forbids all abridgment of the freedom of speech or of the press—as well as of the right of the people peaceably to assemble and to petition the government for a redress of its grievances. Now here is a case which is of special interest to the legal profession.

We have in American, a powerful organization known as the National Association for the Advancement of Coloured People, Inc., the basic aims of which are the elimination of all racial barriers which deprive negro citizens of the privileges, and burdens of equal citizenship rights in the United States—a most desirable aim as we all must agree. One of the activities of this association has been the organization, at its own expense, of a staff of lawyers to encourage and direct legal actions relating to racial discrimination, and to offer the services of attorneys paid by it for that purpose. Now, as you know, every State has a strong social interest in suppressing the illegal practice of barratry, the unlawful stirring up of litigation. This interest the State of Virginia invoked in the passage of a law seeking to radically curb the activities of the Association. Its efforts were unsuccessful. The Supreme Court held that, having in mind the purposes for which it was being resorted to, the litigation was not for the purpose of stirring up litigation, but was a means for achieving the lawful objectives of equality for the members of the negro community. "It is thus", remarked the Court, "a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the Courts...." It adds, "Resort to the Courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious or avaricious use of the legal process for purely private gains."

This decision, it may be noted, was not based on the fact that the case involved the negro question—"For the Constitution protects expression and association without regard to race, creed or political or religious affiliation of the members of the group which invokes its shield or to the truth, popularity, or social utility of the ideas and beliefs which are offered."

Finally, as a very recent illustration of the jealousy with which the Courts protect the enjoyment of personal liberties, only two days ago, the Supreme Court of the United States revised, without even considering it necessary to hear arguments, the conviction of a negro woman secretary of the Congress on Racial Equality, who had refused to answer a question in Court when she had been referred to by her first name, rather than her family name, such being a common custom in her

state. " I will not answer a question until I am addressed correctly" she had said. Her position was approved. One recalls a somewhat similar complaint that has been publicly made by the colored porters on sleeping-cars, against being always addressed by the name of "George". Their annoyance is understandable, but I have not heard that it has ever reached the courts.

THE MACHINERY OF GOVERNMENT ELECTIONS.

There is another recent and significant example of the exercise of the federal power upon the activities of the several states in the field of government. It suggests a type of question which might arise in any federation. You may have seen mention of it in a recent issue of our weekly magazine *Time.* (Feb. 28, 1964.)

In providing for the method by which the members of the federal congress shall be selected, our federal constitution lays down various directions which involve the active participation of the several states. Such requirements must exist in any federation. One of these provides that the Federal House of Representatives "shall be composed of members chosen every second year *by the people* of the several States...." Now that provision means something. It is not just a general invitation to the States to send along their representatives selected in any way they prefer. They must be *chosen by the people*—which means—it would seem quite evident—that the people—*all* the people—must have a fair and equal share in making the choice. Now how to manage this is obviously quite a difficult matter. Each state is entitled to have a fixed number of representatives —based on its population as established by the national census. (Thus, New York, with its population of nearly 17 million is entitled to 41 representatives.) The system is to divide the States into congressional districts—and for the people in each district to elect one representative. But what about the shifting of populations? Supposing it happens that the people in one district find that their vote, in practice, has become of far less value than that of their neighbours. Have they any redress? The answer of the Supreme Court was 'Yes'. "To say that a vote is worth more in one district than in another would not

only run counter to our fundamental ideas of democratic government; it would cast aside the principle of a House of Representatives elected 'by the people', a principle tenaciously fought for and established at the Constitutional Convention." Here then we see a very practical expression of law in a federal state in its relation to its political machinery.

RELIGION :

There is another field very close to the hearts of the people in which the federal power may find itself invoked to secure obedience to the Constitution by the several States. It is the field of religion. As to the general principles of the freedom of religious beliefs, it is safe to say that all modern constitutions speak with the same voice.

Coming from the four corners of the globe, the American people naturally represent a great variety of religious opinion. Today there are, in the United States over 80 separate religious bodies with a membership each of over 50,000. Our Constitution establishes the principle, not merely of freedom of all beliefs and their exercise but of the principle of complete neutrality of our Government as between them. The idea of an established religion, as in England, or of the support of the state of one religion as compared to another, is excluded. Our Constitution (Art. 1), contains the following declaration :

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

By the Fourteenth Amendment to our Constitution in 1868, this provision with others, was made applicable to the States, with the result that the Supreme Court has become the final arbiter of the constitutionality of many widely different types of laws touching religious activities in the various states. Among these is a consistent line of decisions in which the Court has declined to sanction any form of official governmental participation in religious exercises in the public schools, including the recital of any form of prayer, or the reading of the Bible, or the recital of the Lord's Prayer. [1]

---

(1) It is of interest to note the reservations made in one of the concurring opinions (Justice Brennan) concerning a number of forms of activities, not

In an opinion rendered on June 17 of last year, the Court, after recalling a previous decision which had given specific recognition to the fact that "we are a religious people whose institutions presuppose a Supreme Being", continues :—

> "The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality."

And there is an illustration of the application of that part of the clause I have cited which forbids the States from making any law prohibiting the free exercise of religion—the so-called Salute-the-Flag cases. Can a State require its school children to salute the American flag—as part of the daily routine ? Now, you have all probably heard of the religious sect known as Jehovah's Witnesses. Their vigorous assertion of constitutional rights has made their name familiar in our legal history. For them the revealed Word of God is the supreme authority on earth and their children have been taught that such gestures of respect for the symbol of civil authority as saluting a flag are not permitted under the injunction against the making and serving of graven images or their likeness. It took the Courts some time to answer this question ? An earlier decision held that the law of the State of New York was an appropriate measure for the encouragement of that feeling of devotion to our country without which ultimately neither civil nor religious liberty could exist ; but this was later discarded. In an opinion written by a very distinguished jurist, Justice Jackson, (who visited us once in Egypt), he observed that to hold the compulsory flag salute to be valid would be the same as to compel a man to utter what is not in his mind. The requirement was held unconstitutional.

---

involved in the school-prayer case—such as the saying of prayers in legislative chambers ; the provision for churches and chaplains at Military establishments ; the use of the motto "In God We Trust" on coinage and so on.

Finally I offer you an illustration in a field other than education. Within the past year the Court has declined to allow a State to prejudice a claim for unemployment compensation by a woman who was unable to find work because her religious faith (she belonged to the Seventh-Day Adventist Church)—forbade her to wark on Saturday, the Sabbath Day of her faith. These cases are the outcome of a long historic development; volumes have been written on the subject; it is all part of the long struggle for religious liberty—for complete and impartial freedom for all religions.

TREATIES :

I pass to a subject of great delicacy and importance in a federation—that of the treaty power. One of the principal arguments in support of the creation of a federation has always been the advantage to be gained in the field of foreign policy. The conclusion of treaties is a function almost always committed exclusively to the Federal Government,—usually to the Chief Executive with some measure of collaboration with the Legislative body. In the case of the United States, treaties are made by the President "by and with the advice and consent of the Senate"—two-thirds of the senators present concurring. This is a very great power. What are its limitations? Suppose it is alleged by a State that a treaty thus made infringes the rights of the State under the Constitution? It has been the subject in recent years of one of the most active constitutional debates that has ever taken place in our country, provoked largely by the fear that under the cover of collaboration with other foreign governments in movements to protect the rights and liberties of people, the rights and liberties the people of our several states would, in fact, be interfered with.

Some forty years ago the United States gave its adhesion to a treaty providing for specified closed seasons and other measures of protection for migratory birds. The State of Missouri brought a suit—it was a bill of equity—to prevent a game warden of the United States from attempting to enforce the act and the regulations which had given effect to the treaty. What right, it was asked, had the federal government to interfere with the game laws of a State? It is given no such

power by any clause in the Constitution. The birds were owned by the State, for the benefit of its people. How could the treaty create a right not otherwise existing? The argument was rejected by the Supreme Court and the law was held to be constitutional. The treaty, the Court held, did not contravene any express prohibitory words in the Constitution. A national interest of great magnitude was involved. "It can be protected only by national action in concert with that of another power."

This decision, harmless enough on its face, has been seen by many as a threat to the powers of the several states and has led to the proposal for an amendment to the federal constitution known—after the Senator who proposed it—as the Bricker Amendment, the effect of which would be to limit the effectiveness of a treaty to matters over which Congress would have the right to legislate "in the absence of treaty". The proposal however, has not been generally accepted. The people seem content with leaving the Federal Government free in its relations with foreign states, subject to such restrictions as the Supreme Court in which it has confidence, shall find in the terms of the Constitution.

Meanwhile, however, the difficulties that might arise in securing an effective implementation of treaties by the various states has led to the adoption—in some treaties—of a provision known as the 'federal-state clause'—of which an example is found in the original constitution of the International Labour Organization, providing that in the case of a federal state, whose power to enter into conventions in labour matters is subject to limitations, it shall be in the discretion of that government to treat a draft convention as a recommendation only.

The answer seems to be, as suggested in the recent proposed draft of Foreign Relations Law of the United States that the Federal Government does have the power to make a treaty binding on the States, if the matter involved is of sufficient international concern to be properly the subject of international negotiation and is not in violation of any express constitutional limitation applicable to the Federal Government, as for instance, the Bill of Rights protecting every citizen in the exercise of his personal rights and freedoms.

But what are these matters as to which there might be doubt? We have two illustrations in decided cases. A Treaty providing that nationals of each State may "take, hold, transfer and devise" real property in the other states, as if they were nationals—has passed the test— even though the Constitution grants no such specific power to the Federal Government. A similar approval was given to a treaty providing that such nationals may engage in business in another State as if they were nationals. On the whole the federal government seems to enjoy an increasingly wide scope in its exercise of this great power.

STATES:

Finally, gentlemen, the States themselves may get into trouble. They may have difficulties among themselves, or with the federal government; or even with private individuals; trouble that couldn't happen—if they didn't exist—that is, if we didn't have a federal system. What is the answer here? Where does the judicial power come in?

Well, to begin with, under the system which existed before our present government was created in 1789—that is under the Articles of Confederation—the Federal Congress—and not the Courts—was the last resort—and under this system a number of disputes were settled. But when our Constitution came to be adopted an improvement was made. The power of the Law was invoked. It was provided that the judicial power of the United States should extend to "controversies between two or more States." That power has been often invoked. The first case was a suit between New Jersey and New York—the second a boundary suit between Rhode Island and Massachusetts—which it took six years to decide. In that case it was strongly urged that the power of the Court did not extend to suits of a political character. This contention was rejected and since that time there have been many cases involving boundary and similar questions before the Court. Florida v. Georgia, Missouri v. Iowa, Virginia v. West Virginia, Iowa v. Illinois, Louisiana v. Mississippi—titles such as these are familiar in the reports—as are, needless to say, the cases between the several States and the Federal Government. The illustrations most familiar to you

will doubtless be the disputes that have arisen over the use of rivers. These decisions are constantly invoked in disputes between countries, and are thus—with certain reservations—a contribution to international law.

But can these federal states be sued by others than their sister states ? What about the principle that a sovereign is not subject to suit. Well, the Constitution as it was originally adopted provided that the judicial power should extend to all cases "between a State and citizens of another State." A number of suits were begun but the popular objections raised to what seemed a violation of sovereign rights resulted in the adoption of an amendment,—the Eleventh—stating that power should "not be construed to extend" to such suits. It was thus retroactive in effect, and put an end to a number of pending cases by individuals. However, while it has long been settled that suits can be brought by the United States against the several States it is generally conceded that suits could not be brought against a single state by a foreign government.

But you may ask—supposing the State doesn't want to pay—what then ? Can it be forced to do so ? The answer is—and perhaps it is the greatest tribute that exists to our judicial system—we've never had to face that issue. Discussions have arisen—but in the end—the States have paid. To which I need only add, that the Supreme Court has declared in unequivocal language that it has the right to order an execution of its judgment—and no doubt it would have done so if it had ever become necessary.

Such, gentlemen, are a few illustrations of the role of law in a Federal State and its probelms. They could be infinitely multiplied. And what is the moral of it all ? Simply this, I think, It is the moral which is inscribed on the badge which every judge in Egypt wears upon his breast—and which stands above the portals of the Palace of Justice.—LAW IS THE FOUNDATION OF THE STATE. The legal problems facing any federal government are exceptionally complicated and enduring. To a peculiar degree the success of a federal experiment depends upon the acceptance

by the people of the Rule of Law as between states as well as between individuals. Without a strong and independent judiciary well equipped to maintain the delicate balance of power which such a plan of government involves, no federal experiment can hope to survive.

REFERENCES TO SUPREME COURT OPINION MENTIONED IN FOREGOING REMARKS

Constitutional Review :

Marbury v. Madison (1 Cranch 137)

Interstate Commerce :

Florida Avocado Growers v. Paul (373 U.S. 132. 1963).

Civil Rights :

Segregation Cases : Brown v. Board of Education (347 U.S. 483 1954 and 349 U.S. 294. 1955).

Right of Political Expression : N.A.A.C.P. v. Button (371 U.S. 415. 1963).

Religion :

Abington School District v. Schempp. (374 U.S. 203, 1963,) also Sherbert v. Verner (374 U.S. 398, 1963).

Treaties :

Missouri v. Holland. (252 U.S. 416).

States :

Wyoming v. Colorado (259 U.S. 419 1922) and Nebraska v. Nebraska v. Wyoming (325 U.S. 589, 1945), applying the principle of equitable apportionment and the recent case of Arizona v. California (373 U.S. 546 1963) applying a congressional plan for the sharing of the waters of the Colorado River.